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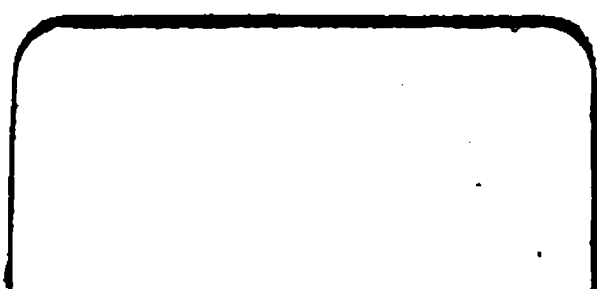
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A COMPENDIUM  
OF  
THE LAW OF  
**REAL AND PERSONAL PROPERTY**

PRIMARYLY CONNECTED WITH CONVEYANCING :

DESIGNED AS

A SECOND BOOK FOR STUDENTS,

AND AS

A DIGEST OF THE MOST USEFUL LEARNING  
FOR PRACTITIONERS.

BY JOSIAH W. SMITH, B.C.L., Q.C.,

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INTERESTS ANNEXED THERETO ; EDITOR OF MITFORD'S "CHANCERY PLEADINGS" ;  
AND ONE OF THE CONSOLIDATORS OF THE CHANCERY ORDERS.)

*Sixth Edition.*

*(Enlarged, and embodying the alterations made by the recent Statutes.*

BY

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## TITLE XII

### OF ALIENATION BY DEED.

#### CHAPTER I.

##### OF DEEDS GENERALLY AND THEIR PARTS.

##### SECTION I.

##### *Of Deeds generally.*

A DEED is a written or printed document on parchment, vellum, or paper, sealed and delivered, to prove and testify the agreement of the parties whose deed it is, to the things therein contained (a). A deed must be written or printed on parchment, vellum, or paper, because there is nothing else which is at once so durable and so little liable to alteration (b). 1711.

Pr. III. T. 12,  
CH. 1, s. 1.

Definition  
of a deed.

Deeds, when considered with reference to the parties to them, are of two kinds: Indentures or deeds inter partes, and Deeds Poll. 1712.

Deeds are  
either in-  
dentures or  
deeds poll.

An indenture or deed inter partes is a deed containing mutual stipulations by two or more persons (c). Formerly, when deeds were more concise than they are at present, if they were made between two or more parties, it was usual to write both parts of which they were composed on the same skin of parchment, with some words or letters of the alphabet written between them,

Definition  
of an inden-  
ture.

Origin of  
the term  
indenture.

Ancient  
mode of  
indenting.

(a) 4 Cruise T. 32, c. 1, § 16; 2 Bl. Com. 295; 1 Pres. Shep. T. 50, 51, 54; Co. Litt. 35 b, 171 b.

T. 54; Co. Litt. 35 b, 229 a.

(c) 4 Cruise T. 32, c. 1, § 20; 2 Bl. Com. 296; Burton, § 140; Co.

(b) 2 Bl. Com. 297; 1 Pres. Shep.

Litt. 229 a.

Pr. III. T. 12,  
Ch. 1, s. 1. through which the parchment was cut in acute angles, instar dentium (from which they acquired the name of indentures or deeds indented), in such a manner as to leave half the words or letters on one part and half on the other (a). Afterwards, indenting in an undulating line came into use, without cutting through any words or letters at all (b). And the practice has long been to cut in this manner the first skin of parchment on which a deed containing mutual stipulations is written (c). 1713.

Modern way  
of indent-  
ing.

Reason for  
indenting.

In its origin, indenting was in all probability a mode of identification, by a comparison of the parts at the point of indenting, and thus a guard against forgery or fraudulent substitution (d). 1714.

Indenting  
not now  
necessary.

As practised in modern times, however, it can be of no utility. And hence it was enacted by the stat. 7 & 8 Vict. c. 76, s. 11, that it should "not be necessary in any case to have a deed indented." And though that Act is repealed by the stat. 8 & 9 Vict. c. 106, yet by s. 5 of the latter Act, "a deed executed after the 1st of October, 1845, purporting to be an indenture, shall have the effect of an indenture, although not actually indented." 1715.

Originals  
and counter-  
parts.

In the case of an indenture, there ought regularly to be as many copies of it as there are parties; and when the several parts are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the original, and the rest are counterparts; but all of them, in law, make but one entire deed. It is usual, however, for all parties to execute every part, which renders them all originals (e). 1716.

Definition  
of a deed  
poll.

A deed poll (which is so called because not indented, but cut in a straight line) is not strictly speaking an

(a) 4 Cruise T. 32, c. 1, § 20.

Co. Litt. 229 a, b, 1.

(b) 2 Bl. Com. 296. See also Co.

(d) 1 Pres. Shep. T. 50.

Litt. 229 a, n. (1).

(e) 2 Bl. Com. 296; 4 Cruise T.

(c) 4 Cruise T. 32, c. 1, § 22;

32, c. 1, § 23; 1 Pres. Shep. T. 51.

agreement between two persons, but a declaration of some person or persons respecting an agreement made by him or them with some other person or persons (a). 1717.

PT. III. T. 12,  
CH. 1, s. 1.

A deed takes effect from its execution, and not from the date of it (b). And in the absence of special circumstances creating an equity to the contrary, where there are several deeds, they operate according to the priority of times of delivery, it being a maxim of common law, *Qui prior est tempore, potior est jure* (c). 1718.

From what  
time a deed  
takes effect.  
Deeds  
operate  
according to  
the order of  
their times  
of delivery.

Bad English will not vitiate a deed, when it does not render the deed unintelligible (d). 1719.

Bad  
English.

[Original instruments creating powers of attorney may, under the provisions of stat. 44 & 45 Vict. c. 41, s. 53 (Appendix), be deposited in the Central Office of the Supreme Court of Judicature.] 1719a.

Deposit of  
original  
instruments  
creating  
powers of  
attorney.

## SECTION II.

### *The several Parts of Deeds enumerated.*

It is not necessary to the validity of a deed that it be framed in any particular mode whatever. The only thing absolutely essential is, that words be used which are sufficient to specify the agreement and bind the parties. But there are certain formal and technical parts in all deeds prepared by professional draftsmen, because these have been well considered and settled by the wisdom of successive ages, as the forms best calculated to express the meaning and accomplish the objects of the parties (e). 1720.

PT. III. T. 12,  
CH. 1, s. 2.

These are : 1. The Date. 2. The Parties. 3. The Recitals. 4. The Operative Part. 5. The Parcels. 6. The Habendum. 7. The Declaration of Uses. 8. The Decla-

(a) 4 Cruise T. 32, c. 1, § 19; Co. Litt. 229 a.

(b) 2 Sugd. Pow. 363.

(c) 4 Cruise T. 32, c. 20, § 5.

(d) *The Queen v. The Inhabitants of Wooldale*, 6 Ad. & El. 549.

(e) 2 Bl. Com. 398; Co. Litt. 7 a.

PT. III. T. 12,  
CH. 1, s. 2.

ration of Trusts. 9. The Reddendum. 10. The Conditions. 11. The Provisoes, Declarations, or Special Stipulations appropriate to the particular transaction. 12. The Covenants. 13. The Testimonium or Conclusion (*a*). 14. The Seals and Signatures. 15. The Attestation. 16. The Receipt for the Consideration indorsed, if there is any pecuniary consideration. The last two are only parts of the deed in a qualified sense, as regularly occurring in the case of formal agreements under seal, but a deed is complete in itself without them. And even when they occur, they are not regarded as themselves under seal (*b*). 1721.

Some of the parts above mentioned always occur in all formal deeds. Such are, 1. The Date. 2. The Parties. 3. The Operative Part. 4. The Testimonium. 5. The Seals and Signatures. 6. The Attestation. 1722.

Recitals are also usually required and inserted in indentures. 1723.

The other parts are peculiar to certain deeds. 1724.

The date, the parties, the recitals, the operative part, and the parcels are all included in the term "the premises," as used in speaking of a deed (*c*). But this word, when used *in* a deed, sometimes refers to the parcels or property comprised in the deed, and at other times it is used in reference to facts and transactions which occur in a former part of the deed, as things præmissa or preceding (*d*). 1725.

### SECTION III.

#### *Of the Date.*

PT. III. T. 12,  
CH. 1, s. 3.

Mode of  
dating.

In expressing the date of a deed, that is, the time of the making thereof, it was the usual practice to mention

(*a*) 2 Bl. Com. 298—304. See Burton, § 513.

(*b*) See Sugd. Concise View, 537; 1 Jarm. & Byth. by Sweet, 90; 1 Pres. Shep. T. 55.

(*c*) 2 Bl. Com. 298; Co. Litt. 6 a; Burton, § 516; 1 Pres. Shep. T. 52, 74.

(*d*) 1 Pres. Shep. T. 74.



the year of the reign of the Sovereign as well as the year of our Lord, but the modern practice is only to mention the year of our Lord. 1726.

Pt. III. T. 12,  
CH. 1, s. 3.

The date may be placed either at the beginning or at the end. In deeds indented, it is now usually placed at the beginning, and in deeds poll at the end (a). 1727.

A deed is good, though it mention no date, or though it have a false date, *i.e.*, a date which is not the date of its delivery, or an impossible date, as the 30th of February; provided the real day of its being dated or delivered can be proved (b). In such a case, it will take effect from the time of its delivery (c). 1728.

No date, or  
wrong date.

The date mentioned in the deed is not conclusive, even against the parties, unless perhaps it be made so by inrolment (d). But a deed is presumed to have been executed at the date expressed in it, unless the contrary be shown (e). 1729.

Date not  
conclusive.

#### SECTION IV.

##### *Of the Parties.*

With respect to the parties to a deed, they are either active or passive. Those who do the act which is to accomplish the object of the deed are the active parties: those in whose favour the act is done are the passive parties. The former are distinguished by the termination *or* in their designations, the latter by the termination *ee*. Thus, parties who grant, lease, or release, are the active parties, and are called the grantors, lessors, and releasors; and those to whom lands are granted, leased, or released, are the passive parties, and are called the grantees, lessees, or releasees (f). 1730.

Pt. III. T. 12,  
CH. 1, s. 4.

Parties are  
either active  
or passive.

(a) 4 Cruise T. 32, c. 20, § 2.

Co. Litt. 46 b.

(b) 2 Bl. Com. 304.

(d) Burton, § 525.

(c) 2 Bl. Com. 304; 4 Cruise T. 32, c. 20, § 4; 1 Pres. Shep. T. 55;

(e) Burton, § 449.

(f) See 4 Cruise T. 32, c. 20, § 7.

Pr. III. T. 12,  
Ch. 1, s. 4.

Who must  
be parties.

All those who have any estate, right, title, or interest whatever, either at law or in equity, in that which is the subject matter of a deed, must necessarily be parties to it, if they are to be bound by it (a). 1731.

When a  
person need  
not be  
named as a  
party in the  
premises.

Even under the old law, a person may take an estate in remainder by a deed to which he is not a party, and when the person to whom the remainder is limited enters on the land, he then becomes bound to perform the conditions contained in the deed (b). A power of attorney may also be given by indenture to a person who is not named as a party (c). And, even under the old law, if no person is named in the premises, one who is named for the first time in the habendum may take an immediate estate; but if any other person was named in the premises as grantee, no new grantee could be added in the habendum in an indenture, unless in correction of an evident clerical mistake, or except by way of remainder or by way of use (d). 1732.

But by the stat. 7 & 8 Vict. c. 76, s. 11, it was enacted "that any person, not being a party to any deed, may take an immediate benefit under it in the same manner as he might under a deed poll." And although that statute was repealed by the stat. 8 & 9 Vict. c. 106, yet by s. 5 of the latter Act, it is enacted that "under an indenture, executed after the first day of October, 1845, an immediate estate or interest, in any tenements or hereditaments, and the benefit of a condition or covenant respecting any tenements or hereditaments, may be taken, although the taker thereof be not named a party to the same indenture." 1733.

Arrange-  
ment of the  
parties.

With respect to the arrangement of the parties, the active parties should be named before the passive parties ;

(a) 4 Cruise T. 32, c. 2, § 3.

(b) 4 Cruise T. 32, c. 2, § 3 ; Co.  
Litt. 231 a ; Burton, § 442.

(c) Burton, § 442, n.

(d) 9 Jarm. & Byth. by Sweet  
87 ; 4 Cruise T. 32, c. 2, § 3 ; and  
c. 20, § 67, 69, 71 ; Burton, § 442 ;  
1 Pres. Shep. T. 76.

the legal owner before the equitable owner; the freeholder before the termor; those who have estates before those who have mere rights; the vendor after all the other active parties; the purchaser before the parties on his behalf. For the sake of perspicuity, if the same persons are made parties in different characters (*e.g.*, both as beneficial owners and as trustees), they should be named as parties of as many different parts as they sustain different characters; and the same rule is to be observed if any of the parties are to take estates or to receive benefits under different characters or in different modes (*a*). But the rule of law does not require this or any other arrangement of the parties (*b*). 1734.

Pt. III. T. 12,  
CH. 1, s. 4.

The parties to a deed ought to be described by their proper Christian and surnames, their rank, profession, and place of residence. But if the description, however imperfect, is sufficient to distinguish the person described from all others, it will be good. *Nihil facit error nominis cum de corpore constat* (*c*). And where a party to a deed is named by different Christian names in different parts of the deed, parol evidence is admissible to show by whom the deed was executed (*d*). 1735.

Description  
of the  
parties.

If several join in a deed, and some are able to make such a deed, and some are not able, the deed is deemed to be the deed of the former alone (*e*). If there are two grantees, and one of them only is capable, the person who is capable will take the whole exclusively, if they were to be joint tenants, because joint tenants take *per mie et per tout*; but only an aliquot part, if they were to be tenants in common, because tenants in common take *per mie* only. But in a gift to persons, as a class,

Where some  
are capable  
and others  
not.

(*a*) Martin's Conveyancer's Recital Book, 25; 9 Jarm. & Byth. by Sweet, 204.

(*b*) 2 Pres. Conveyancing, 419.

(*c*) 4 Cruise T. 32, c. 20, § 10;

Burton, § 529.

(*d*) *The Queen v. The Inhabitants of Wooldale*, 6 Ad. & E. 549.

(*e*) 1 Pres. Shep. T. 81—2; 4 Cruise T. 32, c. 20, § 8.

PT. III. T. 12,  
CH. 1, s. 4.

as tenants in common, those who are capable will take the entirety (a). 1736.

Who may be  
grantors or  
grantees.

All persons that may be grantors may be grantees. And some who cannot grant or give, may yet take or receive (b). 1737.

A person born deaf and dumb is not thereby incapacitated to execute a deed or will, if he has sufficient understanding to give evidence of his assent, either by his own signs, or by signs with the assistance of an interpreter. And he might have acknowledged a fine or suffered a recovery (c). But persons who are born blind as well as deaf and dumb, as they have always wanted the common inlets of understanding, are incapable of contracting or making a gift, lease, grant, or will (d). 1738.

If a gift or grant of goods is made to the churchwardens or to the parishioners of Dale, by those words, it seems this gift is good, and the churchwardens will take to the use of the parish (e). But in general if a grant of land is made to the churchwardens or to the parishioners or to the inhabitants of Dale, or if a grant is made to the commoners of such a waste, or to the lord and his tenants, these are not good grants: for, although these persons are capable, yet they are not capable by these names (f). 1739.

Conveyance  
by a person  
to himself,  
etc.

[With respect to conveyances made after the 31st of December, 1881, it is enacted by stat. 44 & 45 Vict. c. 41, s. 50 (Appendix), that "Freehold land, or a thing in action may be conveyed by a person to himself jointly with another person by the like means by which it might be conveyed by him to another person; and may in like manner be conveyed by a husband to his wife, and by

(a) 1 Pres. Shep. T. 71, 81—2, 237.

(b) 2 Pres. Shep. T. 235.

(c) 3 Jarm. & Byth. by Sweet, 22.

(d) 3 Jarm. & Byth. by Sweet, 23; Co. Litt. 8 a.

(e) 2 Pres. Shep. T. 237.

(f) 1 Pres. Shep. T. 237; see infra, Part IV. T. 1, Ch. 8.

[a wife to her husband, alone or jointly with another person. 1739a. PT. III. T. 12,  
CH. 1, s. 4.]

Formerly, when a person had authority as attorney Acting by  
attorney. to do any act, as to enter into an agreement, he must have done it in the name of the person who gave the authority, and not in his own name, or as his own act (a). And if an attorney covenanted in his own name, for himself, his heirs, etc., it was his personal covenant, although he was described in the instrument as covenanting for and on the part of his principal (b). But now by virtue of stat. 44 & 45 Vict. c. 41, s. 46 (Appendix), the donee of a power of attorney may, if he thinks fit, execute or do any assurance, instrument, or thing in and with his own name and signature and his own seal, where sealing is required, by the authority of the donor of the power; and such assurance, instrument, or thing, is as effectual in law, as executed or done in and with the name, signature, and seal of the donor.] 1740.

## SECTION V.

### *Of the Recitals.*

Recitals are statements made in a deed, with the view of showing what are the interests of the parties, the characters in which they are made parties, and the objects to be effected. In the case of title deeds, recitals are also inserted for the purpose of rendering the deed a constituent part of the evidences of ownership, by stating the facts on which its own validity depends, and referring to preceding deeds which afford information respecting the title, and narrating all such circumstances as have taken place since the execution of the last instrument, so as PT. III. T. 12,  
CH. 1, s. 5.  
Nature and  
uses of  
recitals.

(a) 1 Jarm. & Byth. by Sweet, 428.

(b) 1 Jarm. & Byth. by Sweet, 428; 4 Id. 256—7.

Pr. III. T. 12, to furnish, on the documents themselves, a continuous  
Ch. 1, s. 5. history and explanation of the title (a). 1741.

Effect of a  
recital on  
the con-  
struction.

The recitals of a deed are a key to its true construction, where it is expressed in language that admits of doubt, not where the operative part is clear (b). And hence where there is a particular recital in a deed, and general words of release or conveyance are afterwards inserted, the generality of the words will be qualified by the recital (c). 1742.

The recital of an agreement does not create a covenant where there is an express covenant to be found in the witnessing part relating to the same subject matter (d). 1742a.

Not evi-  
dence  
against  
strangers.

Recitals are never evidence as against persons who are not parties to the deed (e). 1743.

[But it is enacted by stat. 37 & 38 Vict. c. 78, s. 2 (Appendix), that "recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations, twenty years old at the date of the contract shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions" (f).] 1743a.

False  
recital.

Where a circumstance is recited as a fact which proves to be false, though the intention of the parties may be founded on the mistake, the conveyance stands good at

(a) See Martin's Conveyancer's Recital Book, Introduction, and Appendix; 9 Jarm. & Byth. by Sweet, 245; 4 Cruise T. 32, c. 20, § 22.

(b) *Bailey v. Lloyd*, 5 Russ. 330; *Mather v. Fraser*, 2 K. & J. 536; *Childers v. Eardley*, 28 Beav. 648; *Gryn v. Neath Canal Co.*, L. R. 3 Ex. 209; *Daves v. Tredwell*, L. R. 18 Ch. D. (Ap.) 354.

(c) 4 Cruise T. 32, c. 19, § 15;

Burton, § 530; 9 Jarm. & Byth. by Sweet, 817; *Boyes v. Bluck*, 13 Com. B. 652; *Rooke v. Lord Kensington*, 2 K. & J. 753, 768—771; *Jenner v. Jenner*, L. R. 1 Eq. 361.

(d) *Daves v. Tredwell*, L. R. 18 Ch. D. 359 (Ap.).

(e) 1 Jarm. & Byth. by Sweet, 121.

(f) *Bolton v. The London School Board*, L. R. 7 Ch. D. 766.



law (a). But in some cases the mistake may be rectified in equity (b). A mis-recital of a former grant will not invalidate a deed ; neither will a mis-recital of the estate of the grantor in the land, or of the date of the deed by which he acquired the land, render the deed invalid (c). An exception or qualification occurs, however, in the case of an assignment of the parcels comprised in a recited lease, where the lease is recited as bearing date "on" a certain day (and not "on or about" a certain day), and the date is mis-recited ; for in such a case, although in equity the mistake might be corrected, in certain cases at least, yet at law there would be no valid assignment, because, there being no such lease in existence, it would be an assignment of that which did not exist (d). 1744.

PT. III. T. 12,  
CH. 1, s. 5.

A person cannot be required to execute a deed containing incorrect recitals (e). 1745.

A mortgagee cannot refuse to execute a deed of reconveyance, on the ground that it contains no recitals, if all persons interested in the property concur in it (f). 1746.

Omission of  
recitals.

## SECTION VI.

### *Of the Operative Part.*

After the recitals, if any, or after the commencement, if there are no recitals, comes the witnessing or operative part. It is called the witnessing part, because it begins, in case there are no recitals, with the word "witnesseth," or, if there are recitals, with the words, "Now this indenture witnesseth," or, in the case of a deed poll, with the words, "Now know ye, and these presents witness," or "Now these presents witness." It is also called the

PT. III. T. 12,  
CH. 1, s. 6.

(a) Burton, § 538.

Sweet, 288—9.

(b) *Brooke v. Haymes*, L. R. 6 Eq. 25.

(e) *Hartley v. Burton*, L. R. 3 Ch. Ap. 365.

(c) 4 Cruise T. 32, c. 20, § 23.

(f) *Hartley v. Burton*, L. R.

(d) See 2 Jarm. & Byth. by 3 Ch. Ap. 365.

PT. III. T. 12,  
CH. 1, s. 6.

operative part, because it states what is done or intended to be done by the deed, and for what consideration, by whom, and to or in favour of whom; and, if the consideration is a pecuniary one, the payment of it is mentioned in this part. 1747.

Until of late years it was the practice to use operative words of the past tense, as well as of the present: as "Hath granted, and Doth grant." But the past tense is now usually omitted. The practice of using it originated with charters of feoffment, which, before the Statute of Frauds, were a mere record of the livery by which the estate had passed. Its adoption in other cases was generally inaccurate as well as useless (*a*). [The word "grant" is now unnecessary (*b*).] 1748.

## SECTION VII.

### *Of the Parcels or Subject.*

#### I. *The Parcels or Subject generally.*

PT. III. T. 12,  
CH. 1, s. 7.

Territorial  
divisions.

The civil division of the kingdom was originally into counties, hundreds, and vills, tithings, or townships; for parishes were divisions only in reference to ecclesiastical affairs, of which the common law took no notice. But in process of time parishes became divisions in reference to civil matters (*c*), and it is now the constant practice to describe property as situate in a certain parish and county. 1749.

Old, general,  
or vague  
descriptions.

Old, general, or vague descriptions, particularly those of copyholds, will, in most cases, pass the lands which have regularly been held under them (*d*). 1750.

Stating the  
quantity.

Where land has been described in preceding deeds as of a certain estimated quantity, that estimated quantity

(*a*) See 4 Jarm. & Byth. by Sweet, 38; 9 Jarm. & Byth. by Sweet, 638; Watk. Conv. 3rd ed. by Prest. 169.  
(*b*) See *infra*, par. 1874a.

(*c*) 4 Cruise T. 32, c. 20, § 32.  
(*d*) Sugd. Concise View, 231; *Waterpark v. Fennell*, 7 H. L. Cas. 650, 680, 684.

should be stated for the purpose of identifying the land with the land which is the subject of those deeds: but when the estimated quantity and the actual quantity differ, the latter should also be stated (a). 1751.

Pr. III. T. 12,  
Ch. 1, s. 7.

Where a deed would work a forfeiture of property, if it were held to include that property under its general terms, there the Court will not impute to the parties an intention to pass such property (b). 1752.

Property  
not included  
where it  
would work  
a forfeiture.

In conveyances, after describing the thing conveyed, it is usual to add the general words, as they are termed, that is, an enumeration of the incidents, accessories, and appurtenances thereto. Formerly, at least, it was also the general practice to add, "all the reversion and reversions, remainder and remainders," etc. But this clause is unnecessary, and where there is no particular estate it is obviously inapplicable; and therefore by many practitioners it is always omitted (c). After this clause, where inserted or after the general words, where the reversion clause is omitted, follow the words "all the estate, right, title," etc., and sometimes "all deeds, papers, and writings" (d). 1753.

General  
words and  
other clauses  
applicable  
to the  
subject  
matter of  
the deed.

[With reference to the general words, and the estate clause included by implication in conveyances made after the 31st day of December, 1881, see stat. 44 & 45 Vict. c. 41, ss. 6 and 63 (Appendix).] 1753a.

When anything is granted, all the means to attain it and all its fruits and effects, incidents, and accessories are also granted, and will pass inclusively, by force of the grant of the thing itself, without the word appurtenances or any similar words. Cuicunque aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit (e). Thus, by

Means to  
attain or use  
the thing  
granted,  
and fruits,  
incidents,  
and acces-  
sories.

(a) 6 Jarm. & Byth. by Sweet, 73. 435.

19. (d) As to which, see 9 Jarm. & Byth. by Sweet, 88.

(b) *Re Waley's Trusts*, 3 Drewry

165. (e) 1 Pres. Shep. T. 89: 4 Cruise

(c) 9 Jarm. & Byth. by Sweet, T. 32, c. 20, § 30.

PT. III. T. 12,  
CH. 1, § 7.

a demise of land, a right of way appurtenant to it will pass to the lessee, without being mentioned (a); and by the grant of a piece of ground, is granted a way to it, i.e., all usual ways; and if there is no usual way, then a way of necessity will pass. By the grant of trees, is granted the power to cut them down, and take them away, unless the right of cutting is restrained, so as to preserve them for ornament or for other purposes. By the grant of mines is granted the power to dig them; and by the grant of fish in a pond, is granted power to come upon the banks and fish for them (b). By the grant of arable land, the common appendant thereunto will pass. And so by the grant of a house, the estovers appendant thereto will pass (c). And it has been held, that a garden usually occupied with a house will pass by a conveyance of the house "with the appurtenances thereunto belonging," though in the conditions of sale it was expressly excepted (d). That which is parcel or of the essence of a thing, and is still belonging to the same, passes by the grant of the thing itself, although at the time of the grant it be actually severed from it (e). Those things that are inseparably incident to others are not grantable without the things to which they are so incident. And therefore common appendant to land is not grantable without the land itself; and common of estovers appendant to a house is not grantable without the house itself; nor is common appurtenant which is measured by levancy and couchancy or any other terms applicable to the farm. But common appurtenant for a certain number of sheep, etc., is severable (f). 1754.

(a) *Skull v. Glenister*, 16 C. B. (N. S.) 81, 91.

(b) 1 Pres. Shep. T. 89.

(c) 1 Pres. Shep. T. 89.

(d) *Doe d. Norton v. Webster*, 12 Ad. & E. 442. But see *Lister v. Pickford*, 34 Beav. 576, where it

was held that land cannot be appurtenant to land: and that "appurtenances" only include incorporeal hereditaments, such as rights of way, etc., and not additional land

(e) 1 Pres. Shep. T. 90.

(f) 2 Pres. Shep. T. 240.

A grant is void for uncertainty, if the subject matter of it is neither certain in the first instance, nor can be rendered certain. Certainty in the first instance is not necessary; for the maxim is "Id certum est, quod certum reddi potest." Hence a grant of so many trees as may be reasonably spared is void. But a grant of so many trees as A. shall think fit is good; for it may be rendered certain by his determination (a). So if a grant is made of several different things in the disjunctive, this grant may be made certain and complete by the election of the grantee, or by the act of the grantor in performing the grant (b). So if a person having the reversion of four acres of land grant the reversion of two acres, this is a good grant, to be rendered certain and complete by election. But election must be made in the lifetime of the grantor and of the grantee (c).  
1755.

Pr. III. T. 12,  
Ch. 1, s. 7.

Certainty in  
the subject  
matter.

Where the words of original designation, or the first and principal words of description, are erroneous, the thing wrongly designated will not pass (d). But where land is generally but erroneously reputed to be in a particular parish, and forms a part of a farm which is in that parish, it will pass under a devise of all the testator's lands in that parish (e). With respect to words of description superadded to words of original designation, they may either be words of qualification or words of demonstration (f). And where the superadded words are completely incorporated with the preceding words of original designation, so as naturally and almost necessarily to form a restriction, they are words of qualification, and, if erroneous, vitiate the description and the grant itself. But if there are any parcels to satisfy the terms of restriction, they will have

Erroneous  
description.

(a) 2 Pres. Shep. T. 250.

(b) 2 Pres. Shep. T. 251.

(c) 2 Pres. Shep. T. 250.

(d) Burton, § 562; 4 Cruise T.  
32, c. 20, § 59.

(e) *Anstee v. Nelms*, 1 Hurlst. &  
Norm. 235.

(f) *Martyr v. Lawrence*, 2 D. J.  
& S. 261.

PT. III. T. 12,  
CH. 1, s. 7.

effect in restraining the operation of the grant within the extent of the terms of restriction. If the superadded words are not so incorporated with the preceding words, but appear to constitute an additional, independent, particular description of that which is with sufficient certainty described by the preceding words, they are words of demonstration, and, if erroneous, will be rejected (*a*). Thus, if a person grants "all his lands which he had by the grant of J. S. in D.," the grant will not pass any other lands in D. than those which he had of the grant of J. S. But if a person grants all his lands in D., which lands he had by the grant of J. S., all his lands in D. will pass, though he had them not by the grant of J. S. And so if he grants all his lands in D. called N., which was the estate of J. S., there the lands called N. pass, though they never were the estate of J. S. So if the grant is of "all that my house in the occupation of J. S., in St. Andrew's parish," whereas in truth it is in the parish of K., but in the occupation of J. S., it seems this grant is good to pass the house. But if it is of "all that my house in St. Andrew's parish in Holborn, in the occupation of J. S.," and in truth it is in another parish, but in his occupation, this grant is not good to pass the house; because the first term of the description is false (*b*). The words which come after a "videlicet" or "that is to say," can neither enlarge nor restrain the preceding description, though they will explain it, if ambiguous (*c*). 1756.

Effect of  
adding  
words of a  
general  
character.

Where general words are preceded by a specification or enumeration of particulars, the general words will not, without the help of other words, be construed to signify anything of a higher order or more importance than what is before expressed (*d*); but will be held to denote only

(*a*) See 4 Cruise T. 32, c. 20, § 56, 60—62; Burton, § 560, 563, 564; 2 Pres. Shep. T. 247; *Evans v. Angell*, 26 Beav. 202; *Pedley v.*

*Dodds*, L. R. 2 Eq. 819.

(*b*) 2 Pres. Shep. T. 247—8.

(*c*) Burton, § 565.

(*d*) Burton, § 557—8.



things ejusdem generis, upon the principle of the maxim, Pt. III. T. 12, CH. 1, s. 7. noscitur a sociis. But where something is excepted which is not ejusdem generis, it shows that the general words are not to be understood in this restricted sense (a). 1757.

“General words in a grant must be restricted to that which the grantor had then power to grant, and will not extend to anything which he might subsequently acquire” (b). 1758.

[As to what general words are included in conveyances of land, buildings, or a manor, see Stat. 44 & 45 Vict. c. 41, s. 6 (Appendix).] 1758a. General words in conveyances of land, buildings, or a manor.

## II. *Particular Subjects of Property, and the Words by which they pass in a Deed.*

Land, in the legal signification of the term, comprehends the surface and substance of the earth under all circumstances, and everything permanently fixed or incident to it, so as to include every kind of ground, soil, or earth whatever; as meadows, pastures, woods, moors, waters, marshes, furzes, heaths, and all castles, houses, and other buildings thereon, and mines and fossils under it, and articles fixed to the soil by the owner thereof (c). And it comprises land in reversion or remainder, as well as land in possession (d). A grant of all a person's lands or goods passes not only what he is solely seised or possessed of, but also what he is jointly seised or possessed of, as far as respects his share: for verba generaliter dicta generaliter interpretanda: qui omne dicit, nihil excipit. And so e converso, if two persons join in a grant of all their lands or all their goods, this will pass their several as well as their joint property (e). 1759. Land. All lands or goods.

(a) *Irison v. Gassiot*, 3 D. M. & G. 958; *Rooke v. Lord Kensington*, 2 K. & J. 753, 771—3; see *infra*, Pt. III. T. 15, Ch. 3, s. 2.

(b) *Sir G. Mellish*, L. J., in *Booth v. Alovck*, L. R. 8 Ch. Ap. 667.

(c) 4 Cruise T. 32, c. 20, § 42; Burton, § 42; *Mather v. Fraser*, 2 K. & J. 536; and see *supra*, par. 3.

(d) Burton, § 551.

(e) 1 Pres. Shep. T. 90.

PT. III. T. 12,  
CH. 1, s. 7.

Farm.

By the conveyance of a farm, a messuage or principal dwelling-house will pass, and all arable land, meadow, pasture, wood, etc., thereto belonging or therewith occupied (a). 1760.

Messuage or  
house, with  
the appurte-  
nances.

The word messuage is synonymous with dwelling-house ; and a grant of a messuage or house with the appurtenances will not only pass a house, but all buildings attached or adjoining to it ; as also its curtilage, garden, and orchard, together with the close in which the house is built, or pleasure grounds adjoining and belonging to it. But if a greater quantity of land has been usually occupied with the house, it will not pass (b). 1761.

Cottage.

By the grant of a cottage, a small house with its curtilage passes. And the term may also comprise a garden (c). 1762.

Manor

If a person grants his manor, and does not say in what parish it lies, this is a good grant of all the manor. But if it lies in different parishes, and some are mentioned, but others are omitted, no part of the manor lying in the parishes not mentioned will pass (d).—The word manor has a very extensive signification ; for even without the word appurtenances, it will pass, 1. All the demesnes, that is, all the lands whereof the lord is seised within the manor ; and also the freehold of all the lands held by copyholders or other customary tenants, together with all the wastes. But demesnes previously granted in fee do not become a part of the manor again, on a repurchase of them by the lord (as they would if they escheated to him) ; and therefore they do not pass by a devise of the manor prior to such repurchase (e). 2. All the services ; such as fealty, suit of court rents, etc. 3. All courts baron, courts leet, with the fines and perquisites annexed thereto ; and all

(a) 4 Cruise T. 32, c. 20, § 41 ;  
Burton, § 545 ; 1 Pres. Shep. T. 93.

(b) 4 Cruise T. 32, c. 20, § 40 ;  
Burton, § 546 ; 1 Pres. Shep. T. 94 ;  
Co. Litt. 56 b ; *Re Midland Ry.*

*Co.* 34 Beav. 525.

(c) 1 Pres. Shep. T. 94.

(d) 2 Pres. Shep. T. 248 ; 1 Pres.  
Shep. T. 99.

(e) *Delacherois v. Delacherois*,  
11 H.L. Cas. 62.

other franchises that are parcel of, or appendant to, the manor at the time of the conveyance. 4. Advowsons appendant (*a*).—Lands held in fee simple of a manor are not considered as parcel of the manor, although the rents and services issuing out of such lands are parcel of the manor (*b*).—Although many manors have been destroyed, yet they still continue to be called manors, though in fact they are only reputed manors; and a reputed manor will pass in a deed by the word manor (*c*). 1763. Pt. III. T. 12,  
Ch. 1, s. 7.

The grant of a rectory, will pass the house, the glebe, the tithes and offerings belonging to it. And the grant of a vicarage, will pass as much as belongs to it; as the vicarage house, etc. (*d*). 1764. Rectory.  
Vicarage.

A toft is the site of a house which has been pulled down (*e*). 1765. Toft.

A grant of the profits of land carries the land itself (*f*). 1765 a. Profits.

Trees, grass, and corn, growing upon the ground, fruit upon the trees, and wool upon the sheep's back, may be granted as distinct interests from the things on which they grow (*g*). But a lessor for life or years cannot, as against his lessee for life or years, give or grant the trees growing on the ground comprised in the lease, without the licence of his lessee, unless they are first cut down by the lessee, or some other person, or unless they are excepted out of the lease (*h*). 1766. Trees, grain,  
corn, fruit,  
wool.

Mines, if actually opened, are corporeal hereditaments and may be made the subjects of conveyance by livery. And an interest in mines unopened may exist independently of any estate in the surface of the land (*i*). But Mines.

(*a*) 4 Cruise T. 32, c. 20, § 34, 37;  
1 Pres. Shep. T. 92.

(*b*) 4 Cruise T. 32, c. 20, § 35.

(*c*) 4 Cruise T. 32, c. 20, § 38;  
supra, par. 1758a.

(*d*) 1 Pres. Shep. T. 94.

(*e*) Burton, § 546.

(*f*) Burton, § 547; Co. Litt. 4 b.

(*g*) 1 Pres. Shep. T. 95; 2 Pres.  
Shep. T. 241; Burton, § 1162.

(*h*) 2 Pres. Shep. T. 244.

(*i*) Burton, § 1164; 1 Pres. Shep.  
T. 90, 96.

PT. III. T. 12,  
CH. 1, s. 7. the land itself will pass by the name of a "mine," in a conveyance adequate for that purpose (a). 1767.

**Water.** By a grant of water, the land which is covered by the water will not pass, but only the right of fishing in that water. A piece of water should be granted by the name of so many acres of land covered with water. But the word stagnum or pool will pass both the water and the land (b). 1768.

**Remainders and reversions.** A reversion may be granted by the name of a remainder; or a remainder by the name of a reversion (c). By the grant of an acre of land, or of any other thing by the name whereby it is called, the reversion thereof will pass, if the grantor have no more than a reversion (d). 1769.

**Share.** The word share, even in a deed, may embrace accruing as well as original shares (e). 1770.

**Commons.** A grant of common for all beasts is not a grant of common for goats, pigs, and such other beasts and cattle as are not commonable. But it is otherwise if the grant is of common for all manner of beasts (f). 1771.

**Warren.** The word "warren" does not pass an estate in the soil, unless the context of the instrument shows that to be the intention (g). 1772.

**Allotments.** A conveyance of the estate itself in respect of which an allotment is subsequently awarded includes the right to the allotment (h). 1773.

**Machinery.** Under a mortgage or sale of a factory or mill, with "the steam engines, etc., and all other the machinery, fixtures, and effects, fixed up in, or attached, or belonging" thereto,

(a) Burton, § 548.

L. R. 4 Ch. Ap. 562; 6 H. L. 223.

(b) 4 Cruise T. 32, c. 20, § 49; 2 Bl. Com. 18, 19; Burton, § 550; Co. Litt. 4 b.

(h) 1 Jarm. & Byth. by Sweet, 79, 80.

(c) 2 Pres. Shep. T. 249.

(d) 2 Pres. Shep. T. 245.

(e) *Doe d. Clift v. Birkhead*, 4 Exch. 110.

As to the force and meaning of many other terms besides those noticed in this work, which are used to describe parcels, especially in old deeds, see Co. Litt. 4 b—6 a; 1 Pres. Shep. T. 93—97.

(f) 1 Pres. Shep. T. 96.

(g) *Karl Beauchamp v. Winn*,

it has been held that the mortgagee or purchaser only <sup>PT. III. T. 12,  
CH. 1, a. 7.</sup> takes such machinery as essentially belongs to it, and necessarily forms a part of it, whatever may be the purpose to which the mill may be applied, and not machinery merely fitted up in it, such as looms, the legs of which were let into loom foots sunk into the pavement without fastening (a). 1774.

### III. *Exceptions.*

Of course an exception cannot be of the whole thing granted, nor of a part of a thing which is not granted. And if it is of part of a thing granted, or of a thing connected with a thing granted, it must be of such a part or thing as is severable from the thing granted, and not an inseparable interest or incident. It must also be of a thing of that nature that it may be held by itself, and that he who excepts may retain it (b). Hence, if a manor is granted excepting the court baron, or if land is granted excepting the common appendant thereto, these exceptions are void: for no lord except the lord of the manor can hold the court; and no one except the owner of the land can have right to this species of common (c). 1775.

An exception must not be such as is repugnant to the grant. Hence, it must not be such as would utterly subvert the grant, by taking away all the benefits of it: as if a manor or land were granted, excepting the profits thereof. Nor, upon the same principle, may it be such as would be an exception of that which is in terms specifically granted. But, subject to these qualifications, it may be of one thing out of another thing granted, or of a particular thing out of a class of things or aggregate granted (d). Thus, if a person grants all his horses except his white horse, this is good exception of the white horse,

(a) *Hutchinson v. Kay*, 23 Beav. 413.

(b) 4 Cruise T. 32, c. 20, § 66 : 1 Pres. Shep. T. 78, 79.

(c) 1 Pres. Shep. T. 79 ; 4 Cruise

T. 32, c. 20, § 36.

(d) See 1 Pres. Shep. T. 78, 79.

PT. III. T. 12,  
CH. 1, s. 7.

if he has three horses and one of them is white; but if he has only two horses, this exception is repugnant to the terms of the grant, and void. So, if a person grants his house, chambers, and shops, excepting his shops, this is a void exception. So if twenty houses or twenty manors are granted, excepting one of them, this exception is repugnant to the grant, since the exception negatives the right to one of those things which are specifically comprehended in the grant (a). 1776.

On a conveyance of an estate, the grantor may by apt words reserve to himself, or rather may except, the minerals, with power to get them in a way which will destroy the surface. To do this, however, he must so frame the reservation or exception as to show clearly that he is to have such power (b). 1777.

An exception may be made out of an exception, or a saving out of a saving (c). 1778.

## SECTION VIII.

### *Of the Habendum.*

PT. III. T. 12,  
CH. 1, s. 8.

Use of the  
habendum.

The office of the habendum is to point out what estate or interest is granted. But this is frequently and now usually done in the premises as well as in the habendum (d). And where the estate or interest is pointed out in the premises, the habendum is not essential, and in the majority of deeds is useless (e); and in a surrender or a release of right, it is inappropriate (f). 1779.

Where the

As it is a rule that where two parts of a deed are

(a) 1 Pres. Shep. T. 78, 79.

T. 74.

(b) *Hert v. Gill*, L. R. 7 Ch. Ap. 699.

(c) 9 Jarm. & Byth. by Sweet. 460; Burton, § 515.

(e) 1 Pres. Shep. T. 78, n. (68).

(f) 2 Jarm. & Byth. by Sweet.

(d) 2 Bl. Com. 298; 1 Pres. Shep.

170.

absolutely repugnant and irreconcilable, the latter shall be rejected; so, where the habendum is repugnant to and irreconcilable with the premises, and the estate limited in the premises is capable of taking effect, the habendum is void, and the grantee will take the estate given in the premises; unless the estate limited by the habendum is larger than the estate given in the premises, in which case the habendum will prevail; because, according to another rule of law, a deed is to be construed most strongly against the grantor (*a*). 1780.

Pr. III. T. 12,  
Ch. 1, s. 8.

habendum  
is repugnant  
and void.

Where the habendum is not irreconcilable with the premises, but is capable of being regarded as explanatory of the premises, it will be so construed (*b*). 1781.

Where the  
habendum  
explains the  
premises.

To illustrate these rules, if land is given in the premises to A. and his heirs, habendum to A. for life or years, the habendum is utterly repugnant and void. But if land is given in the premises to A. for life, habendum to him and his heirs, he will take the greater estate given by the habendum, *i.e.*, an estate in fee (*c*). Again, if lands are given in the premises to A. and his heirs, habendum to him and the heirs of his body, he will only take an estate tail; because the habendum is considered to explain the kind of heirs meant in the premises (*d*). And so where a tenant in fee conveyed lands to H., her heirs and assigns, to hold to H. and her assigns for the life of G., the habendum, so far as regarded the words "for the life of G.," explained the premises, so as to make the persons designated by the word "heirs" take as special occupants, and not as heirs by descent; but so far as regarded the words "to H. and her assigns," the habendum was rejected: because those

Illustra-  
tions.

(*a*) See 4 Cruise T. 32, c. 20, § 75—77. 84; 9 Jarm. & Byth. by Sweet, 86; 1 Pres. Shep. T. 113; Co. Litt. 299a.

(*b*) See 4 Cruise T. 32, c. 20, § 79—84; 9 Jarm. & Byth. by Sweet, 86

(*c*) 4 Cruise T. 32, c. 20, § 76, 84; 9 Jarm. & Byth. by Sweet, 84.

(*d*) 4 Cruise T. 32, c. 20, § 81; 4 Cruise T. 32, c. 21, § 16; 9 Jarm. & Byth. by Sweet, 84; 1 Pres. Shep. T. 113; Co. Litt. 21 a, n. (2).

Pr. III. T. 12,  
Ch. 1, s. 8.

words were contrary to the premises, as they would make the estate on the death of H. in G.'s lifetime personal assets by virtue of the statutes 29 Car. 2, c. 3, s. 12, and 14 Geo. 2, c. 20, s. 9 (a). 1782.

The habendum will be regarded as explanatory of the premises, instead of inconsistent therewith, where the premises do not at all express the quantity or kind of interest, but the habendum expresses the quantity or kind of interest, and denotes a different quantity or kind of interest from that which by construction of law, in the absence of any controlling clause, the grant in the premises would give. Thus, where a grant is made to a person in the premises, without any words indicative of the quantity of interest he is to take, but an express estate for years is limited in the habendum, the habendum will be held to explain the premises, so that he will take an estate for years, instead of an estate for life, which would have passed by construction of law, but for the habendum (b). And where a lease is made to two, habendum to the one for life, remainder to the other for life, they take according to the habendum (c). And so where a lease is made to two persons, habendum the one moiety to the one, and the other moiety to the other, the habendum makes them tenants in common; whereas by construction of law they would otherwise have taken as joint tenants by the premises (d). 1783.

Where premises and habendum have a several operation as regards the limitation of estates.

Where the premises and the habendum limit estates of different kinds, and they are capable of distinct and several operation, and appear to have been intended so to operate, they will be construed accordingly. Thus, if lands are given in the premises to a person and the heirs of his body, habendum to him and his heirs, if there are circum-

- (a) See 1 Pres. Shep. T. 113; *Doe* 32, c. 20, § 80.  
 d. *Timmis v. Steele*, 4 Ad. & E. (c) Co. Litt. 183 b.  
 (N. S.) 663; and *supra*, par. 1438. (d) Co. Litt. 183 b : 4 Cruise T.  
 (b) Co. Litt. 183 a ; 4 Cruise T. 32, c. 20, § 83.



stances showing such an intention, he will take an estate tail, with a remainder in fee (*a*). 1784.

PT. III. T. 12,  
CH. 1, s. 8.

Although the habendum will fail to qualify the premises, where it cannot be regarded as explaining them, yet the estate limited in the premises may be cut down by the fact that the use declared is not co-extensive with the estate given in the premises, but is only commensurate with the estate limited in the habendum. Thus, if land were given to A. and his heirs, habendum to A. for life, to the use of A. for life, A. would take no larger estate than an estate for life, and the ulterior use would result to the grantor (*b*). 1785.

Where the use declared is not commensurate with the estate in the premises.

A new subject matter cannot be added in the habendum. But an exception may be contained in the habendum (*c*). 1786.

New subject or exception in the habendum.

Sometimes there are two or more grants and only one habendum. This form, though sufficient in point of law, is an incorrect mode of preparing a deed. In other instances there is one clause of grant with several habendums. This form is perfectly correct and even requisite, when it is necessary or convenient to introduce real and personal property, or property held for different estates, in one and the same clause of grant; as in the case of property in the West India Islands, or of freehold and leasehold lands intermixed (*d*). 1787.

Two or more grants and one habendum, or one grant and two or more habendums.

## SECTION IX.

### *Of the Reservation (e).*

A reservation is a clause in a deed, whereby the grantor or lessor, in respect of the grant or lease, reserves to him-

PT. III. T. 12,  
CH. 1, s. 9.

Definition

(*a*) Co. Litt. 21 a ; 4 Cruise T. 32, c. 20, § 85—87.

4 Cruise T. 32, c. 20, § 73.

(*b*) 9 Jarm. & Byth. by Sweet, 85.

(*d*) 1 Pres. Shep. T. 74. See 9

Jarm. & Byth. by Sweet, 130.

(*e*) See Part I. Tit. 2. Ch. 2. s. 2.

(*c*) 9 Jarm. & Byth. by Sweet, 87;

on Rents.

Pr. III. T. 12,  
Ch. 1, s. 9.

of a reservation.

self, or in some cases to the lord of the fee, and not to a stranger, some money, chattel, or service, and not any part of the thing granted or leased or of the estate created, nor a privilege annexed to the property (a). 1788.

As to reserving rent to a stranger.

If a person conveys to another, on condition that he shall render to a stranger a yearly rent; and if he fail of payment thereof, that then it shall be lawful for the grantor to enter, this is a good condition for payment of an annual sum in gross, but it is void as a reservation of a rent (b). 1789.

Subject of reservation.

That which is reserved as rent must be certain, or at least reducible to a certainty by either party (c). 1790.

If a person grants land, yielding for rent, money, corn, a horse, spurs, or a rose, this is a good reservation; but if the reservation were of the grass or of the vesture of the land, or of a common, or of other profit or benefit to be taken or enjoyed from or upon the land, such a reservation, considered as a rent, would be void (d). Rent, heriot, suit of court, and suit of mill, if purported to be reserved, are strictly reservations; but the liberty of hawking, hunting, fishing, and fowling, is not legally a reservation or exception, but a privilege granted to the lessor, though words of reservation and exception are used. Trees, mines, and quarries, purported to be excepted and reserved, are exceptions, not reservations; for an exception is of a part of the thing granted (e). A man cannot grant an estate, and reserve a part of the estate; or make a feoffment in fee, and reserve a lease for life (f). A reservation is commonly said to be a reserving of a new thing issuing out of the property (g);

(a) See Co. Litt. 47 a; 1 Pres. Shep. T. 80; 4 Cruise T. 32, c. 24, § 1; 2 Bl. Com. 299; *Gilbertson v. Richards*, 4 Hurl. & Norm. 277; 5 Hurl. & Norm. 453.

(b) Litt. § 345—6; Co. Litt. 813a.

(c) 3 Cruise T. 28, c. 1, § 3.

(d) 1 Pres. Shep. T. 80; 3 Cruise T. 28, c. 1, § 3; Co. Litt. 142 a.

(e) *Doe d. Douglas v. Lock*, 2 Ad. & E. 705.

(f) 1 Pres. Shep. T. 79.

(g) 1 Pres. Shep. T. 80; 4 Cruise T. 32, c. 24, § 1; 2 Bl. Com. 299.

but the above examples show that it need not strictly Pr. III. T. 12,  
Ch. 1, s. 9. be either a new thing or a thing issuing out of the property. These expressions only mean that it must not be a part of the property, like an exception, nor a privilege annexed to the property, like a right of sporting. 1791.

A person may reserve one rent for one year, and another rent for another year: as 10s. for one year, and 20s. for another year; or a rent to be paid at the end of every second or third year, and no rent for the other years; or one kind of rent for one year, and another kind of rent for another year (a). And there may be several reservations of several rents in the same conveyance. But where there is one reservation of rent in gross at first, though it be afterwards divided and severed into different parts, yet it will be one entire rent (b). Thus if a person grants the manors of A., B., and C., rendering £3, viz., for A. 20s., for B. 20s., and for C. 20s., this is a good reservation; but in this case the rent is entire, for the word "videlicet" cannot divide one rent into several (c). 1792.

If a conveyance or lease is made rendering rent to the heirs of the grantor or lessor, this reservation is void, because the rent is not reserved to himself first; for this mode of reservation would make the heirs purchasers, and the right to the rent would be distinct from the reversion (d). 1793.

Except in the case of leases under statutes, it is generally most advisable, especially when leases are made by virtue of powers, not to specify to whom the reservation is made; for then the rent will be annexed to the reversion, and belong to the person for the time

(a) 1 Prae. Shep. T. 81; 3 Cruise  
T. 28, c. 1, § 3.

(b) 3 Cruise T. 27, c. 1, § 28, 30.

(c) 1 Pres. Shep. T. 81.

(d) 1 Pres. Shep. T. 80; Co. Litt.

213 b.

PT. III. T. 12,  
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being entitled to the reversion (*a*), even where there is no mention of the term for which the rent is to be paid (*b*). A reservation is always taken most in favour of the grantee or lessee, and against the grantor or lessor. And therefore, if the reservation is only to the grantor or lessor, or to him and his assigns, without naming his heirs, executors, or administrators, this reservation will continue only for his lifetime (*c*). It is said that if a lease is made of a term of years, reserving rent to the lessor and his heirs, it will determine by the death of the lessor; for the heir cannot have it, as he cannot succeed to the estate, it being only a chattel; and the executor cannot have it, there being no words to carry it to him (*d*). On the other hand, it is said that if a grantor or lessor seised in fee reserves rent to himself, his executors or assigns, the rent shall continue only for his life; because it cannot be taken by the executors, though named, as they are not privies in estate; and it cannot be claimed by the heir, inasmuch as he is not named, while the grantor or lessor himself and his executors are named (*e*). But where a rent was reserved to the lessor, his executors, administrators, and assigns, yearly *during the term*, it was resolved that it should go to the heir of the lessor (*f*). Where, however, no reversion is left in the lessor, and the rent is reserved to his executors, administrators, and assigns, it will go to them and not to the heir (*g*). 1794.

(*a*) 1 Pres. Shep. T. 80, 115;  
Watk. Conv. 3rd ed. by Prest.  
156—7, 177; Co. Litt. 47 a.

(*b*) 1 Pres. Shep. T. 115.

(*c*) Co. Litt. 47 a; 1 Pres. Shep.  
T. 144; 3 Cruise T. 28, c. 1, § 38.

(*d*) 3 Cruise T. 28, c. 1, § 38.

(*e*) Co. Litt. 47 a; 1 Pres. Shep.  
T. 81, 115; 3 Cruise T. 28, c. 1,  
§ 38.

(*f*) 3 Cruise T. 28, c. 1, § 39.

(*g*) 3 Cruise T. 28, c. 1, § 40.

## SECTION X.

*Of the Covenants (a).*

A covenant is a clause in a deed whereby a person engages, in terms or in effect, that a certain thing is true, or has or has not been done, or shall or shall not be done (b). 1795.

PT. III. T. 12,  
CH. 1, s. 10.  
Definition.

I. *Covenants generally.*

A covenant can only be created by deed, but it may be either by deed poll or by indenture (c). 1796.

A covenant  
can only be  
created by  
deed.

By the old law, a person not named as a party could not be a covenantee under an indenture. But he might covenant with a party to the indenture. And he might be a covenantee in a deed poll (d). And now by the stat. 8 & 9 Vict. c. 106, s. 5, "under an indenture executed after the 1st October, 1845, the benefit of a covenant respecting any tenements or hereditaments, may be taken, although the taker thereof be not named as a party to the same indenture." 1797.

Covenants  
by or with  
strangers.

Generally, where a condition, as regards the matter of it is good or bad, a covenant comprehending the same matter is good or bad also (e). This, for instance, is the case with covenants in restraint of trade (f). A covenant not to carry on a particular trade within the cities of London and Westminster, or within 600 miles from the same, is good, so far as it relates to London and West-

Void cove-  
nants.

(a) See *infra*, Part III. T. 12, Ch. 5, s. 1, as to covenants in purchase-deeds. And as to relief for breach of covenants or conditions in leases, see stat. 44 & 45 Vict. c. 41, s. 14, in Appendix.

(b) See 2 Bl. Com. 304; 1 Pres. Shep. T. 160, 162, and remarks *infra*.

(c) 4 Cruise T. 32, c. 25, § 3

Burton, § 1089.

(d) Shelford's Real Prop. Acts, 6th ed. 596; *Chesterfield, etc., Colliery Co. v. Hawkins*, 3 Hurl. & Colt. 677.

(e) 1 Pres. Shep. T. 163, 164. As to good and bad conditions, see *supra*, par. 198 et seq.

(f) *Catt v. Tourle*, L. R. 4 Ch. Ap. 654.

PT. III. T. 12,  
CH. 1, s. 10. minster, but void as to the rest, as unreasonably restrictive (a). 1798.

Perform-  
ance.

When no time is limited for the performance of a covenant, it must be done within a reasonable time (b). 1799.

Where a  
person  
becomes  
liable to  
covenants  
without  
being a  
party or  
without  
executing.

Where lands are conveyed by indenture to two persons, and one of them does not seal the deed, yet if he enters upon the land and accepts the deed in other respects, he will be bound by the covenants contained in it. And where an estate is limited to a person for life, with a remainder to another who is not a party to the deed, if the remainderman enters, he will be bound by the covenants contained in the deed (c). 1800.

## II. *Express and Implied Covenants.*

Covenants are either express or implied. 1801.

What words  
create an  
express  
covenant.

No particular words are necessary to constitute an express covenant. But in order to create a covenant, there must be an intention to create such an obligation, so as to give a right of action for the breach, and not merely to impose a condition or to make a qualification (d). A recital may amount to a covenant. And cases have arisen where the words "upon condition," "shall," "it is agreed," etc., have been held to import a covenant (e). Where words occurring at the beginning of a sentence are conditional, and have the effect of a condition, they will not be construed to make a covenant. And yet if words of condition and words of covenant are coupled together in the same sentence (as "provided always, and it is covenanted," or the like), in such cases the words may

(a) *Green v. Price*, 13 M. & W. 695. See *supra*, par. 234.

(b) 4 Cruise T. 32, c. 25, § 12.

(c) 4 Cruise T. 32, c. 25, § 4; Co. Litt. 231 a.

(d) *Treloar v. Bigge*, L.R. 9 Ex. 151.

(e) 4 Cruise T. 32, c. 25, § 5—9;

*Wood v. Copper Miners' Co.*, 7 Com. B. 906; 14 Com. B. 428; *Farrall v. Hilditch*, 5 C. B. (N. S.) 840; *Money Penny v. Money Penny*, 3 D. & J. 572; *Lay v. Mottram*, 19 C. B. (N. S.) 479; *Brookes v. Drysdale*, L.R. 3 C. P. D. 52.

be construed to make both a covenant and a condition (a). PT. III. T. 12,  
CH. 1, s. 10.  
1802.

Implied covenants may arise either from the nature of the case, where from the nature of a contract a person must be deemed to have agreed to do or not to do a particular thing, or from the use of certain technical expressions (b).  
1803.

[By virtue of stat. 44 & 45 Vict. c. 41 (Appendix), s. 7, certain covenants for title are implied in every conveyance made after the 31st December, 1881—viz., on a conveyance for value by a beneficial owner, a covenant for right to convey, quiet enjoyment, freedom from incumbrance and further assurance; on a conveyance of leaseholds, for value, by a beneficial owner, a further covenant for the validity of the lease. On a mortgage by a beneficial owner, a covenant for right to convey, quiet enjoyment, freedom from incumbrance, and further assurance; on a mortgage of leaseholds by a beneficial owner, a further covenant for the validity of the lease, payment of rent, and performance of covenants. On a settlement, a covenant by the settlor for further assurance limited. And on a conveyance by a trustee or mortgagee, a covenant against incumbrances. These covenants may be varied or extended by deed, and must be construed in accordance with the provisions of section 64 of that Act.] 1803a.

There are some words which, when used in particular contracts, will create a covenant. Thus, by the old law, the word grant or demise, in a lease for years, creates a covenant in law for quiet enjoyment of the lands demised during the term (c). But by the stat. 7 & 8 Vict. c. 76, s. 6, it was enacted, that the word "grant" should not create any warranty or right of re-entry or

What words  
create an  
implied  
covenant.

(a) 1 Pres. Shep. T. 136; 4 Cruise v. *McLean*, L. R. 8 Ch. Ap. 658.  
T. 32, c. 24, § 6. (c) 4 Cruise T. 32, c. 25, § 13;

(b) *Telegraph Despatch, etc., Co.* Burton, § 846, 891.

PT. III. T. 12,  
CH. 1, s. 10.

covenant by implication, except by Act of Parliament.

And though this Act was repealed by the stat. 8 & 9 Vict. c. 106, yet by section 4 of that statute, the word "give" or the word "grant" in a deed executed after the 1st October, 1845, shall not imply any covenant in law, in respect of any tenements or hereditaments, except so far as the word "give" or "grant" may, by force of any Act of Parliament, imply a covenant. By the stat. 6 Anne c. 35, ss. 30 and 34, and the stat. 8 Geo. 2, c. 6, s. 35, the words "grant, bargain, and sell," in bargains and sales of hereditaments in the East and North Ridings of Yorkshire, inrolled according to those Acts, have the effect of the usual covenants for title in favour of a purchaser (a). And if a lease for years is made, reserving or yielding and paying a certain rent, these words will create a covenant for payment of the rent (b). 1804.

A person who agrees to let agrees to grant a *valid* lease; and therefore impliedly promises that he has a good title to let (c). 1805.

Implied  
covenants  
qualified by  
express  
covenants.

An express covenant will qualify the generality of an implied covenant, so that it shall not extend further than the express covenant (d). 1806.

### III. *General and Specific Covenants.*

Covenants are again divided into general and specific. A covenant to settle lands of a certain value is a general covenant, which does not bind any particular lands of the covenantor, and the covenantee will be deemed a specialty creditor only. But a covenant to settle particular lands is a specific covenant and a lien on those lands (e). 1807.

(a) Burton, § 593; 4 Cruise T. 32, c. 25, § 63.

(b) 4 Cruise T. 32, c. 25, § 13.

(c) *Stranks v. St. John*, L. R. 2 C. P. 376.

(d) 4 Cruise T. 32, c. 25, § 15.

(e) 4 Cruise T. 32, c. 25, § 42; Story's Eq. Jur. § 1249; Sugd. Concise View, 563. See *supra*, par. 982.



IV. *Inherent and Collateral Covenants.*PT. III. T. 12,  
CH. I, s. 10.

Again, covenants are divided into inherent, which are those that immediately relate to the property; and collateral, which are those that immediately relate to some collateral thing (a). 1808.

V. *Joint and Several Covenants.*

Again, covenants may be joint or several, or both joint and several. For, where several persons enter into a covenant, they may bind themselves jointly, or they may bind each of themselves severally, or they may bind themselves jointly and severally (b). 1809.

If two lessees covenant jointly and severally at the beginning of the covenants, these words will extend to all their subsequent covenants, notwithstanding the intervention of covenants on the part of the lessor (c). 1810.

By express words clearly indicative of the intention, a covenant may be joint, or joint and several, by or with the covenantors or covenantees, notwithstanding that the interests are several. So they may be several, although the interests are joint. But the implication of law, when the words are ambiguous or are left to the interpretation of law, is, that the words have an import corresponding to the interest of the parties, so as to be joint when the interest is joint, and several when the interest is several, notwithstanding language which under different circumstances would give to the covenant a different effect (d). Thus, where a person covenants with two or more and with each of them, if each of the covenantees takes a several interest, the covenant is several; but if the covenantees

(a) 1 Pres. Shep. T. 161.

(b) 4 Cruise T. 32, c. 25, § 17.

(c) 4 Cruise T. 32, c. 25, § 19.

(d) 1 Pres. Shep. T. 166; *Sorsbie v. Park*, 12 M. & W. 136; *Pugh v. Stringfield*, 3 Com. B. 2.

PT. III. T. 12,  
CH. 1, s. 10.

take a joint interest in the subject matter of the covenant, it is a joint covenant (*a*). And it has been held, that where A. covenants with one person, "and also, as a distinct covenant," with another, this is a joint covenant on which both must sue jointly, if it appears on the face of the deed that they have a joint interest in the subject matter of the covenant (*b*); and that a covenant with tenants in common, and each and every of them, their and each and every of their heirs, executors, administrators, and assigns, to repair, is a joint and not a several covenant; so that an action must be brought by all the tenants in common, or the survivors or survivor of them (*c*). 1811.

Effect of  
covenant  
with two or  
more jointly.

[Respecting the effect of a covenant with two or more jointly, stat. 44 & 45 Vict. c. 41, s. 60 (Appendix), enacts " (1) A covenant, and a contract under seal, and a bond or obligation under seal, made with two or more jointly, to pay money or to make a conveyance, or to do any other act, to them, or for their benefit, shall be deemed to include, and shall, by virtue of this Act, imply, an obligation to do the act to, or for the benefit of, the survivor or survivors of them, and to, or for the benefit of, any other person to whom the right to sue on the covenant, contract, bond, or obligation devolves. (2) This section extends to a covenant implied by virtue of this Act. (3) This section applies only if and so far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the covenant, contract, bond, or obligation, and to the provisions therein contained. (4) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this Act." ] 1811a.

(*a*) 4 Cruise T. 32, c. 25, § 18.

(*c*) *Bradburne v. Botfield*, 14 M.

(*b*) *Hopkinson v. Lee*, 6 Ad. & E. & W. 559.

(N. S.) 964.

VI. *Real and Personal Covenants.*PT. III. T. 12,  
CH. I, s. 10.Definition  
of covenants  
real.

Covenants are further divided into real and personal. Covenants real are those which have for their object something annexed to, or inherent in, or directly and permanently connected with, real property (a). Thus the usual covenants for title are real covenants (b). 1812.

The essential difference between a real and a personal covenant is, that a real covenant runs with the land (c). And a covenant which runs with the land is one of which the obligation on the one hand, and the benefit, to be enforced by action, on the other hand, will attach upon the successive owners of the property (d). 1813.

Essential  
difference  
between  
covenants  
real and  
personal.  
Covenant  
running  
with the  
land.

Whether the covenants are real or personal, the covenantor is liable to an action for damages for breach of covenant, or, if he is dead, his executors or administrators are liable to the extent of his personal property in their hands; and if the covenant is (as it constantly is) for him and his "heirs," then his heir is also liable, so far as the value of any real property which has descended to him in fee simple may extend (e). [By the old law the] heirs are not bound unless named; and the heirs cannot be bound unless the obligation commences in or with the ancestor; and therefore a covenant by a man, for himself, his executors and administrators, or for his heirs, without naming himself, even though the act is to be done after his death, will not bind the heirs. The executors and administrators are bound without being named, unless the act is one which is to be performed personally by the covenantor, and there has been no breach before his death (f). 1814.

Liability of  
the cove-  
nantor, his  
heirs, execu-  
tors, and  
adminis-  
trators.

(a) 4 Cruise T. 32, c. 25, § 21. See *Thomas v. Hayward*, L. R. 4 Ex. 311, *infra*, par. 1824.

(b) 4 Cruise T. 32, c. 25, § 64 : Sugd. Concise View, 435.

(c) 4 Cruise T. 32, c. 25, § 25, 28. See *Wilson v. Hart*, 2 Hem. & M. 551 ;

*Hooper v. Clark*, L. R. 2 Q. B. 200.

(d) Burton, § 475.

(e) Burton, § 579 ; Sugd. Concise View, 452.

(f) 1 Pres. Shep. T. 80, 177—8 ; 1 Jarm. & Byth, by Sweet, 434 : 3 Id. 484—5.

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Ch. 1, s. 10.

Covenants to  
bind heirs,  
or executors,  
administra-  
tors, and  
assigns.

[But now as regards covenants made after the 31st day of December, 1881, it is enacted by stat. 44 & 45 Vict. c. 41 (Appendix), s. 58, that “(1) A covenant relating to land of inheritance, or devolving on the heir as special occupant shall be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed. (2) A covenant relating to land not of inheritance, or not devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his executors, administrators, and assigns, and shall have effect as if executors, administrators, and assigns were expressed.” And it is also enacted by s. 59 of the same Act that “(1) A covenant, and a contract under seal, and a bond or obligation under seal, though not expressed to bind the heirs, shall operate in law to bind the heirs and real estate, as well as the executors and administrators, and personal estate, of the person making the same, as if heirs were expressed. (2) This section extends to a covenant implied by virtue of this Act. (3) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the terms of the covenant, contract, bond, or obligation, and to the provisions therein contained. (4) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this Act.”] 1814a.

Covenants,  
contracts  
under seal,  
bonds, or  
obligations  
under seal,  
to extend to  
heirs and  
real estate.

As to liabi-  
lity of exe-  
cutor or ad-  
ministrator  
in respect of  
rents, cove-  
nants, or  
agreements.

By the stat. 22 & 23 Vict. c. 35, s. 27, “Where an executor or administrator, liable as such to the rents, covenants, or agreements contained in any lease or agreement for a lease granted or assigned to the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said lease or agreement for a lease as may have accrued due and been claimed up to the time of the assignment hereafter mentioned, and shall have set apart a sufficient fund to answer any future

claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised or agreed to be demised, although the period for laying out the same may not have arrived, and shall have assigned the lease or agreement for a lease to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part, or any further part (as the case may be), of the personal estate of the deceased to meet any future liability under the said lease or agreement for a lease; and the executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease or agreement for a lease; but nothing herein contained shall prejudice the right of the lessor or those claiming under him to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed." 1815.

And by s. 28, "In like manner, where an executor or administrator, liable as such to the rent, covenants, or agreements contained in any conveyance on chief rent or rent-charge (whether any such rent be by limitation of use, grant, or reservation), or agreement for such conveyance, granted or assigned to or made and entered into with the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said conveyance, or agreement for a conveyance, as may have accrued due and been claimed up to the time of the conveyance hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum cove-

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As to liability of executor, etc., in respect of rents, etc., in conveyances on chief rent or rent-charge.

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naunted or agreed by the grantee to be laid out on the property conveyed, or agreed to be conveyed, although the period for laying out the same may not have arrived, and shall have conveyed such property, or assigned the said agreement for such conveyance as aforesaid, to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part or any further part (as the case may be) of the personal estate of the deceased to meet any future liability under the said conveyance or agreement for a conveyance; and the executor or administrator so distributing the residuary estate shall not, after having made or executed such conveyance or assignment, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said conveyance, or agreement for conveyance; but nothing herein contained shall prejudice the right of the grantor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or among whom the said assets may have been distributed." 1816.

Appointee  
of covenantor  
not bound.

Those persons only will be bound by a real covenant, who take the estate of the covenantor. And therefore an appointee of the covenantor will not be bound: because the appointee is in under the deed creating the power: his estate is derived out of the seisin, not of the appointor, but of the person out of whose seisin the appointor's estate was derived (*a*). 1817.

Liability of  
assignee to  
lessor.

In the case of inherent, but not of collateral covenants, even though assigns be not mentioned, and whether the assignment is from the lessee himself, or from his representatives, or from any other assignee, an assignee is bound

(*a*) 9 Jarm. & Byth. by Sweet, 439, 441; 4 Cruise T. 32, c. 25, 315, 346; Sugd. Concise View, 437, 67.

by an express real covenant from the date of his assignment, whether he enter or not, but only while he continues assignee; and he may at any time discharge himself from his obligation to the reversioner, but not from his covenants for indemnity, by an assignment, even to a beggar (a). 1818.

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Ch. 1, a. 10.

But the lessee himself, the original covenantor, is not discharged from liability on an express covenant by assigning over the term; nor are his heirs, when named, nor his executors or administrators; for the lessor or grantee of the reversion may either charge the lessee, his heirs, executors, or administrators, or the assignee (b). But the original lessee is discharged from all implied covenants by his assignment, if assented to by the reversioner (c). 1819.

Liability of  
lessee after  
assignment.

Each successive assignee of a lease is bound to indemnify the original lessee against breaches of covenants in the lease committed by each assignee during the continuance of his own term (d). 1820.

Liability of  
assignee to  
lessee.

A person who is not assignee of the whole term or unexpired residue of a term, but is a mere underlessee, or an assignee of, or person claiming under, an underlessee, is not liable to an action for the breach of any of the covenants contained in the original lease (e). But he may under certain circumstances be liable to an injunction (f). 1821.

Underlessee  
or one  
claiming  
under him  
not bound.

The benefit of real covenants passes to the heirs of the covenantor, although entered into with him and his executors and administrators only, if they relate to land of which the covenantor is seised, either previously to or by the deed containing such covenants, or by a deed forming, with such deed, a part of one transaction. And the benefit of real

To whom  
the benefit  
of real  
covenants  
passes.

(a) 1 Pres. Shep. T. 177, 180; Burton, § 1086; 9 Jarm. & Byth. by Sweet, 338—9.

(b) 1 Pres. Shep. T. 180; 4 Cruise T. 32, c. 25, § 37; Burton, § 1086; *Smyth v. North*, L. R. 7 Ex. 242.

(c) Burton, § 1087.

(d) *Moule v. Garrett*, L. R. 5 Ex. 132; 7 Ex. (Ex. Ch.) 101.

(e) 4 Cruise T. 32, c. 25, § 33; Burton, § 855 n.

(f) *Parker v. Whyte*, 1 Hem. & Mil. 167; *Clements v. Welles*, L. R. 1 Eq. 200.

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CH. 1, s. 10.

covenants, entered into with the covenantee, his heirs and assigns, or even with the covenantee and his heirs only, also passes to all persons who take the estate of the covenantee or any estate derived out of that estate, but not to persons whose estate is derived out of the seisin of some other person. Hence, where covenants are entered into with the releasee to uses and his heirs and assigns, or with him and his heirs only, they run with the land for the benefit of all the cestuis que use whose estates are derived out of the momentary seisin of such releasee, whether such cestuis que use are or are not parties to the conveyance, and whether they claim immediately under it, or by virtue of an appointment made under a power contained in that conveyance. And so, where the covenants are made, not with the releasee to uses, but with the cestui que use and his heirs and assigns, or with him and his heirs only, they run with the land for the benefit of any person who claims as successor or alienee of his estate. But when made with the cestui que use and his heirs and assigns, they do not run with the land for the benefit of an appointee of the cestui que use; because such appointee, though the alienee of the cestui que use, is not the alienee of his estate; for the cestui que use, by the appointment, defeats and annihilates his own estate, and substitutes a new estate in favour of his appointee, which takes effect, not out of the seisin of the cestui que use, but out of the original seisin of the releasor to uses. In consequence of this, where the releasee to uses and the purchaser are different persons, covenants which are intended to run with the land should be made with the releasee to uses, and not with the cestui que use (a). 1822.

As the covenants will only run with the estate of the covenantee, if he takes but a particular estate, and an estate

(a) 4 Cruise T. 32, c. 25, § 28, 64; 364; Burton, § 581, 585; 1 Pres. Sugd. Concise View, 435—441; 9 Shep. T. 176; *Western v. Macdermot*, Jarm. & Byth. by Sweet, 355, 362, L. R. 1 Eq. 499.



in remainder is limited to another person, the covenants will not run with the latter estate, unless the remainderman is expressly named in the covenant, and, in cases under the old law, is also a party to the deed (a). 1823.

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Ch. 1, s. 10.

If a covenant does not concern the land itself, but only a particular mode of occupying or using the same, it does not run with the land. Thus, if a lessee covenants to use the premises as a public-house, and the lessor covenants not to build or keep any house for the sale of beer or spirits within a certain distance of the demised premises, the lessor's covenant does not run with the land, so as to enable the assignee of the lease to sue him (b). 1824.

Where the whole of a term is assigned, and no reversion is left in the assignor, though the rent be reserved to the original lessee and not to the lessor, the assignee will be entitled to the benefit of the covenants contained in the original lease (c). 1825.

## VII. *Construction of certain Covenants.*

In the case of a covenant not to carry on a profession or business within a certain distance of a specified place, it should be defined in what way the distance is to be measured: whether in a straight line "as the crow flies," or by the nearest mode of practicable access. In the absence of such definition, it has been held (but not unanimously) that the distance is to be measured in the former way (d). 1826.

The widow of the covenantor, claiming dower is a person claiming under him, within the meaning of the covenants for title (e). 1827.

Covenantor's widow  
claims  
under him.

Although covenants are to be construed according to the intent of the parties, yet where a person covenants

Covenant to  
keep policy  
on foot.

(a) 9 Jarm. & Byth. by Sweet, 363. See *supra*, par. 1798.

(b) *Thomas v. Hayward*, L. R. 4 Ex. 311.

(c) 4 Cruise T. 32, c. 25, § 5.

(d) *Mouflet v. Cole*, L. R. 7 Ex. 70; 8 Ex. (Ex. Ch.) 32.

(e) See 4 Cruise T. 32, c. 25, § 78.

Pr. III. T. 12,  
Ch. 1, s. 10.

to do and perform all such acts, matters, and things as may be requisite for continuing and keeping on foot a policy of insurance on his life, it was held that this covenant could not be read negatively, as if he had covenanted to do no act whereby it would become void; and that therefore the covenant is not broken by his suicide, whereby the policy becomes forfeited (a). 1828.

Meaning of  
expression  
"clear of  
taxes."

It has been held that a charge for repair of a bridge is not a parliamentary tax, within the meaning of a covenant to pay rent clear of "all taxes and deductions whatsoever, parliamentary or parochial," where it arises from a liability by reason of tenure, and does not originate in an Act of Parliament, though an Act of Parliament supplies a more convenient mode of raising the necessary funds to meet it (b). 1829.

Covenant as  
to purpose  
for which a  
house or  
land is to be  
used.

Where a house is sold subject to a covenant not to carry on any trade, business, or calling whatever, in or upon it, or otherwise use, or suffer the same to be used, to the annoyance, nuisance, or injury of any of the houses on the estate, the carrying on a school for young ladies, or an hospital, is a breach of the covenant (c). 1830.

There have been several cases relating to covenants as to the sale of beer and other drinks, and the law seems in an unsettled and unsatisfactory state (d). 1831.

Where a purchaser covenants that he will not do anything that would be "a nuisance," the word "nuisance" must be restricted to its technical meaning, and not

(a) *Dormay v. Borrodaile*, 10 Beav. 335; 5 Com. B. 380.

(b) *Baker v. Greenhill*, 3 Ad. & E. (N. S.) 148.

(c) *Kemp v. Sober*, 1 Sim. (N. S.) 517; *Bramwell v. Lacy*, L. R. 10 Ch. D. 691.

(d) *Pease v. Coats*, L. R. 2 Eq. 688; *London & N. W. Ry. Co. v.*

*Garnett*, L. R. 9 Eq. 26; *Jones v. Bone*, L. R. 9 Eq. 674; *Bishop of St. Albans v. Battersby*, L. R. 3 Q. B. D. 359; *London & Suburban Land & Building Comp. v. Field*, L. R. 16 Ch. D. (Ap.) 645; *Holt & Co. v. Collyer*, L. R. 16 Ch. D. 718; *Nicoll v. Fenning*, L. R. 19 Ch. D. 258.

regarded as synonymous with "annoyance"; and the establishment of a national school is not a legal nuisance, though it may tend greatly to depreciate the value of the adjoining property, which the covenant was designed to protect (a). 1832.

The erection of a charitable educational institution is an infringement of a covenant that no building shall be used otherwise than as and for a private residence only, or for any purpose of trade (b). 1832a.

### VIII. *Cesser, Discharge, or Satisfaction of Covenants, and Relief against them.*

Where a person has expressly and absolutely contracted or covenanted to do a particular thing, it is no ground for the interference of a Court of Equity that he has been prevented by accident or unforeseen circumstances from fulfilling his engagement, or from deriving the full benefit of the contract on his side. For he might have prevented any injury to himself from accident, by making proper exceptions; but since he omitted doing so, the law will presume an intentional general liability (c). So that if a lessee covenants to keep the demised premises in repair, he will be bound to do so, notwithstanding any unavoidable accident by which they are destroyed or injured (d). And where there is a covenant to pay rent during the term, without any proper exceptions, it must be paid, notwithstanding the premises are accidentally burnt down during the term (e). And where a person covenants to raise and work a certain number of tons of coal in the year, and pay for the same a certain rate per ton, or pay a fixed rent, whether the coals should be wrought or not; the whole amount of rent may be claimed, although the

No relief in equity against an absolute agreement

to repair,

or to pay rent;

to raise and pay for a certain quantity of coals.

(a) *Harrison v. Good*, L. R. 11 Eq. 338.

(b) *German v. Chapman*, L. R. 7 Ch. D. (Ap.) 271.

(c) See Story's Eq. Jur. § 101—104.

(d) Story's Eq. Jur. § 101.

(e) Story's Eq. Jur. § 102.

Pt. III. T. 12,  
Ch. 1, s. 10.

mine is so exhausted that the lessee could not raise the number of tons in the year. In such a case it is considered that the Court cannot import into the covenant a condition that there should be coals to that extent: if such was the intention of the parties, they should have so expressed it (a). But where performance of a covenant is become impossible, by the act of God (as where a person who covenants to serve another for seven years, dies before the seven years are expired), the covenant is discharged (b). **1833.**

Oppressive  
covenant  
not enforced  
in equity.

If a covenant is very injurious and oppressive, a Court of Equity will not enforce it, nor grant an injunction to prevent a breach of it (c). **1834.**

Covenants  
determined  
with the  
deed or  
estate  
itself.

Where the deed itself, wherein the covenants are contained, or the estate on which the covenants depend, is at an end, there, regularly, the covenants are also determined, except in cases provided against by the stat. 7 & 8 Vict. c. 76, s. 12, and 8 & 9 Vict. c. 106, s. 9 (d). And, therefore, under the old law, if a lease for life or years was surrendered, except for the purpose of renewal, or if a deed was void by erasure or the like, and there were covenants contained in the deed, the covenants were also extinguished thereby. But a surrender did not discharge a breach of covenant antecedent to such surrender (e). **1835.**

Where, on a purchase by the lessee, a conveyance of the inheritance is made by the lessor to the lessee, that puts an end to the covenants in the lease (f). **1836.**

Where the  
leaving a  
distributive  
share by an  
intestate is  
a perform-

In the case of a covenant that a wife or relative shall receive a gross sum on the death of the covenantor, his or her distributive share, in the case of an intestacy, if equal

(a) *Marquis of Bute v. Thompson*, 13 M. & W. 487.

(b) 1 Pres. Shep. T. 180.

(c) *Talbot v. Ford*, 13 Sim. 173.

(d) See Part III. T. 12, Ch. 2,

end of s. 5, on Leases.

(e) 1 Pres. Shep. T. 180; 1 Platt on Leases, 787—8.

(f) Sugd. Concise View, 124.

to or greater than the sum covenanted to be paid, is to be considered as a performance; if less, as a part performance. But where the covenant is that an annuity shall be paid or secured on the death of the covenantor, the distributive share is not a performance or part performance (a). And, where the covenant debt arises in the lifetime of the covenantor (as where he covenants within two years after marriage to pay a certain sum, and he outlives the two years), a distributive share will not be a performance or a satisfaction of the covenant. Nor is an orphanage part; for it is not in the father's power (b). 1837.

Pt. III. T. 12,  
Ch. 1, s. 10.

ance or  
satisfaction  
of an obliga-  
tion by  
covenant.

Where a father, on the marriage of his daughter, covenants that he will, by deed or will, give, leave, and bequeath unto her an equal share with his other children, of all the real and personal estate of which he may die seised or possessed, and the daughter dies in her father's lifetime, and he devises and bequeaths his property to his surviving children, it has been held that this is no breach of the covenant (c). 1838.

Where an  
obligation  
by covenant  
is dis-  
charged by  
death of  
the person  
in whose  
favour it  
was entered  
into.

## SECTION XI.

### *Of the Indorsed Receipt.*

It is the usual practice to acknowledge payment of the consideration money in the operative part. And sometimes there is a distinct recital of the payment of the same. In addition to either or both of these, it is usual, in the case of a purchase or mortgage, where the consideration money is paid or advanced at the time of the execution, to indorse upon the deed a receipt for it, signed by the party who receives the money. But when the payment of the money is recited as an antecedent transaction, it is not usual to place a receipt on the back of the deed. At law, either the recital or the acknowledgment, if sufficiently precise, will

Pt. III. T. 12,  
Ch. 1, s. 11.

(a) 2 Spence's Eq. Jur. 609.

(b) 2 Spence's Eq. Jur. 609.

(c) *Jones v. Horr*, 7 Hare 267.

Pr. III. T. 12,  
Ch. 1, s. 11.

bind the parties by estoppel. But the indorsed receipt is not conclusive, because not under seal. And in equity, none of these are of any avail if non-payment is proved, as it may be (a). In equity, payment will be presumed, after a great length of time (b). The indorsed receipt, or, it seems, a distinct circumstantial recital of payment in the body of the deed, is, under ordinary circumstances, sufficient to excuse persons subsequently dealing with the purchaser, from inquiring whether the money has been actually paid (c). And, on the other hand, the absence of any receipt for the consideration is notice to a purchaser that it has not been paid (d). 1839.

Receipt in deed sufficient discharge; and whether in, or indorsed on deed, sufficient evidence for subsequent purchaser, of payment of whole consideration.

[As regards deeds executed after the 31st day of December, 1881, stat. 44 & 45 Vict. c. 41 (Appendix), enacts by s. 54, "A receipt for consideration money or securities in the body of a deed shall be a sufficient discharge for the same to the person paying or delivering the same without any further receipt for the same being indorsed on the deed;" and also by s. 55, that "A receipt for consideration money or other consideration in the body of a deed or indorsed thereon, shall in favour of a subsequent purchaser not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given, wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof." This section annuls the old presumption from the absence of an *indorsed* receipt, that the purchase or mortgage money has not been paid. And with respect to the receipt in a deed or indorsed thereon being an authority for payment to a solicitor see *supra*, par. 1092b (e).] 1839a.

(a) Sugd. Concise View, 537; Burton, § 535; 1 Jarm. & Byth. by Sweet, 90; 5 Id. 552; 9 Id. 78; 4 Cruise T. 32, c. 20, § 27.

(b) Sugd. Concise View, 537.

(c) 9 Jarm. & Byth. by Sweet, 78.

(d) 1 Jarm. & Byth. by Sweet, 93.

(e) See *In re Bellamy and the Metropolitan Board of Works*, L. R. 24 Ch. D. (Ap.) 387, where this was held not to apply to the solicitor of trustees.

## CHAPTER II.

OF THE DIFFERENT KINDS OF DEEDS: AND FIRST, OF THE  
DIFFERENT KINDS OF COMMON LAW CONVEYANCES.

THOSE deeds which are termed conveyances, in the wide sense of the word, and which serve to create, divide, transfer, discharge, strengthen, defeat, or renounce estates or interests, may be arranged into two great classes:—

PART III.  
T. 12, CH. 2.  
Division of  
convey-  
ances.

I. Conveyances at the common law.

II. Statutory Conveyances, that is, deeds which derive their efficacy from the operation of an Act of Parliament. 1840.

I. Of Common Law Conveyances there are about thirteen kinds:—1. Feoffments. 2. Gifts. 3. Grants. 4. Bargains and Sales. 5. Leases. 6. Exchanges. 7. Partitions. 8. Releases. 9. Confirmations. 10. Surrenders. 11. Assignments. 12. Defeasances. 13. Disclaimers. 1841.

Common  
law convey-  
ances.

Defeasances and disclaimers operate in effect as conveyances, by causing property to return. Feoffments, leases and partitions exclusively relate to real estate. Gifts, grants, bargains and sales, exchanges, releases, confirmations, surrenders, assignments, defeasances, and disclaimers may relate either to real or to personal estate. 1842.

II. Not reckoning those deeds which existed at common law, and when made to uses operate under the Statute of Uses, such as feoffments and bargains and sales to uses, there are about ten kinds of statutory deeds:—1. Covenants to stand seised. 2. Deeds of Lease and Release. 3. Statutory Releases. 4. Statutory Grants, that is, Grants to uses under the Statute of Uses and the stat. 8 & 9 Vict.

Statutory  
convey-  
ances.

PART III.  
T. 12, CH. 2.

c. 106, s. 2. 5. Deeds to lead and declare the uses of other assurances. 6. Deeds of revocation of uses. 7. Deeds of appointment under powers. 8. Leases under powers. 9. Bargains and sales under the Act for the abolition of Fines and Recoveries. 10. Concise conveyances and leases under stat. 8 & 9 Vict. c. 119 [repealed by stat. 44 & 45 Vict. c. 41], stat. 8 & 9 Vict. c. 124, and stat. 25 & 26 Vict. c. 53. [Also Statutory Mortgages and Short Forms of Deeds under stat. 44 & 45 Vict. c. 41 (Appendix).] 1843.

Deeds  
operating  
by transmu-  
tation of  
possession,  
or without  
transmuta-  
tion of  
possession.

Deeds under the Statute of Uses are said to operate either without transmutation of possession, as in the case of a bargain and sale, or a covenant to stand seised; or by transmutation of possession, as in the case of deeds to lead or declare the uses of feoffments, fines, or recoveries: for, in the former case, the alteration of the legal seisin is effected by the mere operation of the statute, the use alone being transferred by the conveyance itself; while in the latter case, the legal seisin is first transferred by a common law assurance before the statute operates (*a*). 1844.

Deeds other  
than con-  
veyances.

III. There are some other deeds which affect or concern real or personal estate, but are not properly termed conveyances. Such are, 1. Deeds of covenant or agreement respecting real estate. 2. Bonds. 3. Declarations of trust of real estate. 4. Deeds of appointment of trustees, receivers, stewards, guardians, attorneys, and others standing in a confidential relation. 1845.

Deeds when  
considered  
with refer-  
ence to the  
purpose to  
be effected  
by them.

IV. Some of these various deeds serve as purchase deeds, others as mortgage deeds, others as marriage settlements, others as deeds of arrangement, others as deeds of indemnity, others as composition or creditors' deeds, others as apportionments of rents, others as partnership deeds, and others are used for certain other purposes which will appear from the definitions given of them in the following pages. 1846.

(*a*) 1 Cruise T. 11, c. 4, § 12—14; 2 Pres. Shep. T. 510.



## SECTION I.

*Of a Feoffment.*

A feoffment properly signifies a conveyance of corporeal hereditaments for an estate in fee simple, or for a determinable fee other than an estate tail, by livery of seisin evidenced by a deed in writing. Sometimes, however, a feoffment signifies a conveyance of corporeal hereditaments by livery, evidenced by deed, though only in tail or for life. But a feoffment in tail is more properly termed a gift, and a feoffment for life, a lease (a). 1847.

Pr. III. T. 12,  
Ch. 2, s. 1.  
Definition.

A feoffment consists of two distinct acts: first, livery of seisin, or delivery of possession, which was all that the common law required. And, secondly, a written explanation signed by the feoffor, which is required by the Statute of Frauds (b). By the stat. 8 & 9 Vict. c. 106, this must be by deed: for it is enacted, by s. 3 of that Act, "that a feoffment made after the 1st of October, 1845, other than a feoffment made under a custom by an infant, shall be void at law unless evidenced by deed." 1848.

Two parts of  
a feoffment;  
Livery of  
seisin,  
and a  
written  
explana-  
tion,  
which must  
now be by  
deed.

Livery of seisin is of two kinds: livery in deed, and livery in law. The first is an actual delivery of some symbol of possession on the land, with apt words. The second is a verbal delivery within sight of it (c). 1849.

Livery is  
either in  
deed or in  
law.

Livery in law does not transfer the freehold till an actual entry is made by the feoffee. Therefore, if either the feoffor or feoffee dies before an entry is made under the livery thus given, it becomes void (d). If the feoffee dared not enter through fear of his life or bodily harm, then his continual claim made yearly in due form of law as near as possible to the lands, formerly sufficed without

How livery  
in law re-  
quires to be  
perfected.

(a) 1 Pres. Shep. T. 203, 204; Co. Litt. 9 a, 271 b, n. (1).

(b) Burton, § 20; 4 Cruise T. 32, c. 1, § 18; 4 Cruise T. 32, c. 4, § 4; 1 Pres. Shep. T. 203.

(c) See 4 Cruise T. 32, c. 4, § 8, 11; Co. Litt. 48 a, b, 49 b; 1 Pres. Shep. T. 215, 216.

(d) 4 Cruise T. 32, c. 4, § 12;

Pr. III. T. 12,  
Ch. 2, s. 1. an entry (*a*). But, by the stat. 3 & 4 Will. 4, c. 27, s. 11,  
“no continual or other claim upon or near any land shall  
preserve any right of making an entry or distress or of  
bringing an action.” 1850.

Livery in law must be made to the freeholder himself:  
if made to a lessee for years, it would not enure to a  
remainderman, but was void (*b*). 1851.

Where  
livery is  
necessary.

In cases not within the stat. 7 & 8 Vict. c. 76, s. 2, or  
8 & 9 Vict. c. 106, s. 2, which will be presently noticed,  
livery of seisin is necessary in all cases on the creation or  
transfer of any estate of freehold in possession in corporeal  
hereditaments, except by matter of record, as by the  
King's letters patent, or by fine or recovery, or by deed  
indented and enrolled, or by way of covenant and raising  
of use, or by way of surrender, devise, release or con-  
firmation, or by way of increase. But it is not requisite,  
nor indeed could it be made, on the creation or transfer of  
incorporeal hereditaments alone. Neither is it requisite  
upon the creation or transfer of a lease for years or other  
chattel interests (*c*). 1852.

Who may  
give livery.

As livery of seisin is the delivery of the actual posses-  
sion, it follows that no person who has not the actual  
possession at the moment can give livery in deed (*d*); and  
therefore it is requisite that all persons that have any  
lawful estate and possession in the thing whereof livery  
is to be made, such as lessees for life or years, join in the  
making thereof, or be removed thence (*e*). 1853.

Of what  
livery can  
be made.

A feoffment can only be made of corporeal hereditaments  
of which the actual possession may be delivered to the  
feoffee, except that incorporeal hereditaments, appendant,  
incident, or accessory to corporeal hereditaments, may

(*a*) 2 Bl. Com. 316; Co. Litt.  
48 b.

(*b*) Co. Litt. 49 b.

(*c*) 1 Pres. Shép. T. 210, 211; 2  
Bl. Com. 314; Watk. Conv. 3rd ed.  
by Prest. 32, 161.

(*d*) 4 Cruise T. 32, c. 4, § 10,  
Watk. Conv. 3rd ed. by Prest. 160;  
Co. Litt. 50 a, 48 b.

(*e*) 1 Pres. Shép. T. 206, 213;  
Watk. Conv. 3rd ed. by Prest. 160  
—2; Co. Litt. 48 b. and n. (8).

pass with the corporeal hereditaments, as the principal, by means of a feoffment (*a*). 1854.

PT. III. T. 12,  
CH. 2, s. 1.

Livery of seisin must be made in the lifetime of the parties. A distinction, however, occurs between the case of joint tenants and that of tenants in common. Where the feoffers are joint tenants, if one of them dies before livery, as his share survives to the others, the entirety of the parcels may pass from the survivors. But where they are tenants in common, the part of the person dying devolves to his heirs, and the feoffment of the survivors will not pass his share, as it is not in them ; but it will be good as to their own shares. So, where the feoffees are to be joint tenants, notwithstanding the death of one of them before livery, the entirety of the parcels will pass to the survivors. But where they are to be tenants in common, the livery will be void as to persons dying before livery is made, and as to the shares intended for them ; but it will be good as to the survivors and the shares intended for them (*b*). 1855.

When livery  
must be  
made.

Livery in deed may be given and received by attorney. But, 1. He must be authorized by deed, *i.e.*, either by the feoffment itself or by some other deed ; and hence an infant or a married woman cannot give livery by attorney. 2. The attorney must pursue his authority, in substance and effect at least. 3. He must do it in terms or in substance in the name of the person who gives the authority. 4. Livery must be given in the lifetime of the parties ; so that the seisin may pass out of the feoffor in his lifetime, into the feoffee in his lifetime. But livery in law may not be made by attorney (*c*). 1856.

Livery by  
attorney.

When a particular estate for years or of freehold and a freehold remainder are created together *de novo* out of a corporeal hereditament in possession, livery is given to the

How livery  
is given  
when a  
freehold  
estate is  
created

(*a*) 4 Cruise T. 32, c. 4, § 26 ; 1 Pres. Shep. T. 206, 214 ; Burton, § 40, 42.

(*b*) 1 Pres. Shep. T. 212.

(*c*) 1 Pres. Shep. T. 217, 218 ; 4 Cruise T. 32, c. 4, § 14, 15 ; 2 Bl.

Pr. III. T. 12,  
CH. 2, s. 1.

expectant  
on another  
estate.

tenant of the particular estate in possession, and it then enures to the remainderman. When an estate is created afterwards, expectant on a lease then in being, the livery must not be made to the lessee for years; for, if it were, it would operate nothing, *nam quod semel meum est, amplius meum esse non potest*; but it must be made to the remainderman himself, by consent of the lessee for years (a). 1857.

How livery  
must be  
made in the  
case of  
several  
pieces of  
land.

If an estate is made of divers pieces of land in divers villages in the same county, livery of seisin of and in any part thereof in the name of all the rest, or according to the deed, suffices for all, provided all the pieces are in the grantor's possession and out of lease. But if the pieces of land lie in divers counties, or if they are in the same county and they are in lease under different leases, or out of the possession of the feoffor, it is requisite that livery of seisin be made upon some of the lands in both or all the counties, and upon every parcel of land that is out of possession or in the occupation of a distinct occupier, or at least in some parcel of the land in the occupation of every several tenant (b). 1858.

Memoran-  
dum of  
livery of  
seisin  
indorsed.

A memorandum that livery of seisin was given is usually indorsed on all ancient feoffments. But Courts of Law and Equity will presume livery of seisin to have been given, though not indorsed on the deed, where the possession has gone according to the feoffment for a length of time (c). 1859.

Livery  
supplied.

A Court of Equity will supply the want of livery of seisin, where a feoffment appears to have been made for valuable consideration (d). 1860.

The land

Except so far as the stat. 8 & 9 Vict. c. 106, s. 3, may

Com. 315, 316; Watk. Conv. 3rd ed. by Prest. 165; Co. Litt. 48 b, 52 a, b.

(a) 2 Bl. Com. 166, 167, 314; Co. Litt. 49 b.

(b) 1 Pres. Shep. T. 212; 4 Cruise T. 32, c. 4, § 7; 2 Bl. Com. 315; Litt. s. 61.

(c) 4 Cruise T. 32, c. 4, § 16.

(d) 4 Cruise T. 32, c. 4, § 17.

alter the case, the land passes by the livery, and not by the deed, which, without livery, conferred only an estate at will (*a*). 1861.

PT. III. T. 12  
CH. 2, s. 1.

passes by  
the livery.

No particular words are essential. But in modern times the word "enfeoff" has been usually employed as an operative verb, in conjunction with some other or others, such as "give," "grant," "alien," and "confirm" (*b*). 1862.

Operative  
words.

The effect of a feoffment was always to confer some estate of freehold in *præsenti*, that is, either in actual possession or subject only to a chattel interest. It naturally imported the gift of an immediate estate, and its operation could not be suspended or deferred, so as to give only an estate in *futuro*. And hence a remainder, after it is created, cannot be conveyed by feoffment (*c*). 1863.

Operation of  
a feoffment.

In cases not within the stat. 7 & 8 Vict. c. 76, s. 7, or 8 & 9 Vict. c. 106, s. 4, the operation of a feoffment is in some respects stronger than that of any other conveyance. Thus, by reason of the entry and livery of seisin, it clears all disseisins, abatements, intrusions, and other wrongful or defeasible estates, where the entry of the feoffor is lawful—an effect which is not produced even by a fine, recovery, or bargain and sale by deed indented and enrolled. And it not only passes the present estate of the feoffor, but bars him of all present and future right and possibility of right to the thing which is so conveyed; insomuch, that, if he has divers estates, all of them pass by his feoffment; and if he has any interest, rent, common, condition, power, contingent use or benefit in, to, or out of the land, it is extinguished by the feoffment. And it also destroys all contingent remainders in strangers, if supported only by an estate of freehold or of inheritance in the feoffor (*d*).

(*a*) 4 Jarm. & Byth. by Sweet, 38 ; 212 ; 2 Bl. Com. 314 ; Watk. Conv. 1 Pres. Shep. T. 203 ; Co. Litt. 56 b. 3rd ed. by Prest. 95 ; Co. Litt. 217 a.

(*b*) 4 Cruise T. 32, c. 4, § 4 ; 4 (*d*) 4 Cruise T. 32, c. 4, § 28 ; 1 Jarm. & Byth. by Sweet, 59, 62. Pres. Shep. T. 204 ; Co. Litt. 9 a ;

(*c*) Burton, § 22 ; 1 Pres. Shep. T. Watk. Conv. 3rd ed. by Prest. 164.

PT. III. T. 12,  
CH. 2, s. 1.

And, by the old law, a feoffment operated upon the possession, without any regard to the estate or interest of the feoffor; so that even if the feoffor had only a particular estate of freehold, or a chattel interest, or no interest at all, but had the actual possession, either by right or by wrong, and therefore was not a mere trespasser (*i.e.*, a person who entered while the rightful owner retained the possession), the feoffment would pass an estate in fee simple, though such estate might be defeated by the remainderman or reversioner, whose estate was thereby converted into a mere right, or by the rightful proprietor (*a*). And a feoffment, whether in fee or in tail, or for the life of the feoffee, or another person, made by a tenant in tail, who was actually seised by force of the entail, created a discontinuance of the estate tail, by transferring to the feoffee, not only the possession, but also the apparent right of possession, so as to take away the entry of the issue in tail, as also of the persons in remainder, and of the reversioner, and to drive them to their real action (*b*). And in the case of a feoffment for life by the tenant in tail, he thereby created a tortious estate in himself in fee simple in reversion expectant on the decease of the feoffee (*c*). 1864.

By the stat. 7 & 8 Vict. c. 76, s. 7, it was enacted "that no conveyance shall be voidable only when made by feoffment or other assurance, where the same would be absolutely void, if made by release or grant; and that no assurance shall create any estate by wrong, or have any other effect than the same would have if it were to take effect as a release, surrender, grant, lease, bargain and sale, or covenant to stand seised (as the case may be)." This was repealed by the stat. 8 & 9 Vict. c. 106; but by s. 4 of that Act, it is enacted, "that a feoffment made after

(*a*) 4 Cruise T. 32, c. 4, § 29; Co. 80, 161, 163.

Litt. 271 b, n. (1), 330 b, and n. (1);  
1 Pres. Shep. T. 205; Burton, § 71  
—2; Watk. Conv. 3rd ed. by Prest.

(*b*) 4 Cruise T. 32, c. 4, § 30;  
supra, par. 1471—4.

(*c*) Co. Litt. 334 b, n. (1), 339 a.

the 1st day of October, 1845, shall not have any tortious operation." 1865. PT. III. T. 12, CH. 2, s. 1.

By the stat. 7 & 8 Vict. c. 76, s. 2, it was also enacted, Stat. 7 & 8 Vict. c. 76, s. 2.  
 "That every person may convey by any deed, without livery of seisin, or enrolment, or a prior lease, all such freehold land as he might before the passing of this Act have conveyed by lease and release; and every such conveyance shall take effect as if it had been made by lease and release." This was repealed by the stat. 8 & 9 Vict. Stat. 8 & 9 Vict. c. 106, s. 2. c. 106; but by s. 2 of that Act, "after the said 1st day of October, 1845, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery." 1866.

## SECTION II.

### *Of a Gift.*

A gift of real estate is properly applied to the creation of an estate tail, as a feoffment is to that of an estate in fee simple: and hence the person creating the estate tail is termed the donor, and the person taking it, the donee. It differs in nothing from a feoffment, except in the nature of the estate that passes by it; so that livery of seisin must be given to the donee to render it effectual. The operative word is "give"; but any other word or words that show the intention of the parties will have the same effect (a). 1867. PT. III. T. 12, CH. 2, s. 2.  
Gift of real estate.

A gift of personal estate is a gratuitous transfer of such property from one person to another (b). 1868. Gift of personal estate.

To constitute a transaction a gift of money, and negative

(a) 4 Cruise T. 32, c. 4, § 32; 2 Bl. Com. 316; Watk. Conv. 3rd ed by Prest. 173—4.

(b) 1 Pres. Shep. T. 227; 2 Bl. Com. 440.

PT. III. T. 12,  
CH. 2, S. 2.

the intention of a loan, at least where it is followed by a promissory note for the amount, it is necessary to show not only it was meant as a gift, but that it was accepted as a gift (*a*). 1869.

A gift of personal chattels, to be valid and binding, must either be accompanied by a deed or by actual or constructive delivery of the possession. And hence a mere verbal gift of a chattel to a person in whose possession it is, does not pass any property to the donee, unless the donee does some act testifying his acceptance of the gift (*b*). 1870.

### SECTION III.

#### *Of a Grant.*

PT. III. T. 12,  
CH. 2, S. 3.

Definition of  
a grant,  
specifically  
so called.

What may  
be conveyed  
or created  
by grant.

A grant at common law, specifically so called, is a conveyance of an incorporeal hereditament (*c*). 1871.

As livery of seisin was the regular mode of conveying corporeal hereditaments at the common law, so a deed of grant was the proper mode of transferring incorporeal hereditaments, or creating any estate out of them; and hence corporeal hereditaments were said to lie in livery, and incorporeal hereditaments to lie in grant. But the former now lie in grant as well as in livery (*d*). 1872.

Creation or  
transfer of  
remainders  
and rever-  
sions, or of  
any estate  
out of them.

But here it must be observed, that, although livery of seisin was the regular way of conveying corporeal hereditaments, yet an actually existing remainder or reversion in corporeal hereditaments, being itself an incorporeal hereditament, could not be conveyed by livery, nor could any

(*a*) *Hill v. Wilson*, L. R. 8 Ch. Ap. 888, 896.

(*b*) 2 Steph. Com. 44; *Shower v. Pilck*, 4 Exch. 478; *Bourne v. Fusbrooke*, 18 C. B. (N. S.) 515; Add. Cont. 45.

(*c*) 2 Pres. Shep. T. 228.

(*d*) 4 Cruise T. 32, c. 4, § 26, 33; Co. Litt. 272 b. n. (1); 2 Bl. Com. 317; 3 Jarm. & Byth. by Sweet, 259. See *supra*, par. 14, 1866.



estate or interest be created out of it by livery, but it might be by grant. And, on the other hand, although a grant was the regular way of transferring incorporeal hereditaments, including remainders and reversions, or creating any estate or interest out of them; yet a freehold remainder could not be created *de novo* out of corporeal hereditaments in possession, without livery, and by mere grant, because that was in fact a conveyance of a corporeal hereditament, though in remainder, and not the conveyance of a previously subsisting remainder or of an estate created out of a remainder, that is, of an incorporeal hereditament (a). 1873.

PT. III. T. 12,  
CH. 2, s. 3.

The proper words of a grant are "give and grant"; but any other words that show the intention of the parties to pass the property will have the same effect (b). 1874.

Operative  
words.

[By stat. 44 & 45 Vict. c. 41, s. 49 (Appendix), it is provided that the use of the word grant is not necessary in order to convey tenements or hereditaments corporeal or incorporeal. The word generally used in the forms in the schedule to that Act, is convey.] 1874a.

Grant,  
convey.

A grant only operates on the estate or interest of the grantor, and will pass no more than what he is by law enabled to convey (c). At law, a person cannot grant or charge that which he has not at the time of the grant, though he acquire it afterwards (d). 1875.

Operation of  
a grant.

#### SECTION IV.

##### *Of a Bargain and Sale.*

A bargain and sale is a contract whereby the bargainor, for money or money's worth given or expressed

PT. III. T. 12,  
CH. 2, s. 4.

Definition of

(a) See 2 Bl. Com. 166, 167, 314; Bl. Com. 317; Watk. Conv. 3rd ed. Watk. Conv. 3rd ed. by Prest. 95, by Prest. 172. 109, 161.

(b) 4 Cruise T. 32, c. 4, § 36; 2

(c) 4 Cruise T. 32, c. 4, § 40.

(d) 4 Cruise T. 32, c. 4, § 37.

Pt. III. T. 12,  
Ch. 2, s. 4.

a bargain  
and sale.

Operative  
words.

Bargains  
and sales are  
of three  
kinds.

Considera-  
tion.

to be given, bargains and sells property to the bargainee.  
**1876.**

The operative words are "bargain and sell" (*a*). **1877.**

Bargains and sales are of three kinds; first, common law bargains and sales under a common law authority, as in the case of bargains and sales from executors who have an authority to sell; secondly, bargains and sales under an authority given by an Act of Parliament; thirdly, bargains and sales which derive their effect from the Statute of Uses (*b*). **1878.**

A bargain and sale cannot be good except in consideration of money or money's worth, given or expressed to be given; but the amount or value is not material (*c*). The consideration of long acquaintance, or of friendship, or of natural love and affection, or of marriage, or that the bargainee is bound in a recognizance for the bargainor, cannot create a use upon a bargain and sale (*d*). Nor will the payment by the bargainee of the bargainor's debts out of the bargainor's lands support a deed as a bargain and sale; for, in fact, there is no consideration except the trouble (*e*). But a rent reserved on a bargain and sale, even though it be only of a peppercorn, is a sufficient consideration (*f*). If there is a valuable consideration given, although it be not expressed, the bargainee may aver it, and, if proved, the bargain and sale is good. On the other hand, if a valuable consideration is expressed, though not paid, yet the deed is good as a bargain and sale (*g*). And if it purports to be made "for a certain sum

(*a*) Watk. Conv. 3rd ed. by Prest. 203.

(*b*) 1 Pres. Shep. T. 227; 3 Jarm. & Byth. by Sweet, 238; 9 Jarm. & Byth. by Sweet, 425—6; Watk. Conv. 3rd ed. by Prest. 204.

(*c*) 4 Cruise T. 32, c. 9, § 19, 20, 22; Burton, § 144; 3 Jarm. & Byth. by Sweet, 248; Watk. Conv. 3rd ed.

by Prest. 202.

(*d*) 3 Jarm. & Byth. by Sweet, 248.

(*e*) See 4 Cruise T. 32, c. 9, § 25, 26.

(*f*) 4 Cruise T. 32, c. 9, § 27.

(*g*) 1 Pres. Shep. T. 223; Burton, § 144; Watk. Conv. 3rd ed. by Prest. 202.

of money," or "for a certain competent sum of money," Pt. III. T. 12, CH. 2, s. 4. that will be sufficient (*a*). And a bargain and sale may be made to a person who does not pay any consideration, so long as it is made for a valuable consideration given by another person (*b*). 1879.

All private persons having an estate of freehold in possession, vested remainder, or reversion, may convey by bargain and sale, in fee, for life, or for years (*c*). And not only corporeal hereditaments, but also incorporeal hereditaments in actual existence, may be conveyed by bargain and sale (*d*). But things not in esse, such as a right of common or way not before created, or estovers, cannot be so conveyed (*e*); for as they are not existing, no one can be seised of them. And a person having only a chattel interest in lands cannot convey it by bargain and sale, because he has no seisin out of which a use can arise (*f*). A common law bargain and sale may, however, be made of chattels personal (*g*). 1880.

Who may convey by bargain and sale, and what may be so conveyed.

A bargain and sale, if enrolled within the proper time, binds the land in point of title from the execution thereof; so that, if the bargainor attempted to dispose of or charge the estate between the delivery of the deed and the enrolment thereof, such an intervening disposition or charge would be void (*h*). And the death of the bargainor or of the bargainee before enrolment, is not material. Where the bargainee dies before enrolment of the deed, if it is afterwards duly enrolled, his heir will be in by descent (*i*). And an assurance made by the bargainee before enrol-

Disposition by, or death of bargainor or bargainee before enrolment.

(*a*) 1 Pres. Shep. T. 223; 4 Cruise T. 32, c. 9, § 20, 22.

(*b*) 3 Jarm. & Byth. by Sweet, 239.

(*c*) 4 Cruise T. 32, c. 9, § 4, 11, 15, 18; Watk. Conv. 3rd ed. by Prest. 203.

(*d*) 4 Cruise T. 32, c. 9, § 16.

(*e*) 4 Cruise T. 32, c. 9, s. 17; 1

Pres. Shep. T. 222.

(*f*) 4 Cruise T. 32, c. 9, § 18.

(*g*) 1 Pres. Shep. T. 224.

(*h*) 1 Pres. Shep. T. 226—7; 2 Pres. Shep. T. 511; 4 Cruise T. 32, c. 9, § 34; 3 Jarm. and Byth. by Sweet, 238; Burton, § 142.

(*i*) 4 Cruise T. 32, c. 9, § 35.

PT. III. T. 12,  
CH. 2, s. 4.

ment is valid, if the bargain and sale is afterwards duly enrolled (*a*). 1881.

Disuse of  
bargains  
and sales of  
real estates.

Bargains and sales of real estate under the Statute of Uses are now little used as assurances from vendor to vendee, because they do not admit of the limitations usual in purchase deeds, namely, the limitations to prevent dower, including the power of appointment (*b*). And these assurances do not admit of general powers (*c*). 1882.

Bargain and  
sale of lands  
of debtors to  
the Crown.

By the statute 25 Geo. 3, c. 35, the lands of debtors to the Crown which have been extended, may, by order of the Court of Exchequer, be sold and conveyed by bargain and sale enrolled (*d*). 1883.

Enrolment  
of bargains  
and sales  
of real  
property for  
an estate of  
freehold.

A bargain and sale under a common law authority does not require enrolment (*e*). But to the validity of a bargain and sale of real property for an estate of freehold, under the Statutes of Uses, enrolment was rendered necessary by the Statute of Enrolments. By the common law, the transfer of property in land was made a matter of publicity by a formal giving and taking possession; and the secret nature of uses is mentioned in the preamble to the Statute of Uses as one of the principal inducements to their abolition. Yet, as the effect of the construction put upon that statute was, that such property might be transferred by a secret transaction; in order to remedy this, the stat. 27 Hen. 8, c. 16, was passed (*f*), whereby it was enacted, that no "manors, lands, tenements, or other hereditaments shall pass, alter, or change from one to another, whereby any estate of inheritance or freehold shall be made

(*a*) 3 Jarm. and Byth. by Sweet, 238.

(*b*) 9 Jarm. & Byth. by Sweet, 281, 425—6. See *supra*, par. 674, 691.

(*c*) Watk. Conv. 3rd ed. by Prest. 204.

(*d*) 2 Cruise T. 14, § 106.

(*e*) 3 Jarm. & Byth. by Sweet, 238; 9 Jarm. & Byth. by Sweet, 425—6.

(*f*) Burton, § 139; 2 Bl. Com. 338; Co. Litt. 48 a, n. (3); Watk. Conv. 3rd ed. by Prest. 202.

or take effect in any person or persons, or any use thereof to be made, by reason only of any bargain and sale thereof, except the same bargain and sale be made by writing indented, sealed, and enrolled in one of the King's Courts of Record at Westminster, or else within the same county or counties where the same manors, lands, or tenements, so bargained and sold, lie or be, before the custos rotulorum and two justices of the peace, and the clerk of the peace of the same county or counties, or two of them at the least, whereof the clerk of the peace to be one; and the same enrolment to be had and made within six months next after the date of the same writings indented."

Pr. III. T. 12,  
Ch. 2, s. 4.

But by s. 2, it is provided, that this enactment shall not "extend to any manor, lands, tenements, or hereditaments, lying or being within any city, borough, or town corporate within this realm, wherein the mayors, recorders, chamberlains, bailiffs, or other officer or officers have authority or have lawfully used to enrol any evidences, deeds, or other writings within their precinct or limits; anything in this Act contained to the contrary notwithstanding." 1884.

Particular  
exemptions  
from enrol-  
ment.

In consequence of this exception, lands and tenements in cities and boroughs having the privilege of enrolment are not within the Act; and though the intention of the statute was only to exempt them from enrolment in the Courts at Westminster, yet it is worded in such a manner that they are discharged from any enrolment whatever (a). 1885.

The deed must be an indenture, and the enrolment must be on parchment (b). 1886.

Kind of  
deed and  
mode of  
enrolment.

The computation of the time for enrolment is by lunar months, except in the case of a disentailing assurance, and from and exclusive of the day of the date of the

Computa-  
tion of the  
six months.

(a) 4 Cruise T. 32, c. 9, § 32.

(b) 1 Pres. Shep. T. 221, 223.

PT. III. T. 12,  
CH. 2, s. 4. deed, or, if it bears no date or an impossible one, from and exclusive of the day of delivery (a). 1887.

Enrolment  
after death.

The enrolment may be made after the death of either party (a). 1888.

Pleading or  
giving in  
evidence.

The bargain and sale, as such, cannot, after the end of six months, or even during the six months, be given in evidence or pleaded, unless it has been enrolled within the six months (b). 1889.

Enrolment  
in Lanca-  
shire,  
Cheshire,  
Durham,  
and York-  
shire.

By the statute 5 Eliz. c. 26, bargains and sales of lands lying in the counties palatine of Lancaster and Chester, and the bishopric of Durham, are required to be enrolled in the respective Courts of those counties. And by the statute 5 Anne c. 18, 6 Anne c. 35, and 8 Geo. 2, c. 6, bargains and sales of lands lying within the west, east, and north ridings of the county of York, may be enrolled before the registrars of those ridings (c). 1890.

Exemption  
from enrol-  
ment by the  
stat. 7 & 8  
Vict. c. 76,  
s. 2.

By the statute 7 & 8 Vict. c. 76, s. 2, it was enacted, "that every person may convey by any deed, without livery of seisin, or enrolment, or a prior lease, all such freehold land as he might before the passing of the Act have conveyed by lease and release." But this enactment was repealed by the stat. 8 & 9 Vict. c. 106, s. 1, as from the 1st day of October, 1845. 1891.

Bargains  
and sales of  
personal  
chattels  
and of real  
property for  
a term of  
years.

To a bargain and sale of personal chattels at the common law, or of real property for a term of years, under the Statute of Uses, by a person having an estate of freehold, no enrolment is requisite by the Statute of Enrolments, 27 Hen. 8, c. 16 (d). But by [s. 8 of stat. 45 & 46 Vict. c. 43 (Appendix),] bills of sale of personal chattels are now required to be registered (e). 1892.

(a) 3 Jarm. & Byth. by Sweet, 238; Burton, § 141; 1 Pres. Shep. T. 223.

(b) 1 Pres. Shep. T. 222.

(c) 4 Cruise T. 32, c. 9, § 30.

(d) 1 Pres. Shep. T. 224

(e) See Ch. 7, s. 3, *infra*.

## SECTION V.

*Of Leases and Underleases (a).*

A lease is properly a conveyance of any lands or tenements (usually in consideration of rent or other annual recompense) made for life, for years, or at will, but always for a less time than the lessor has in the premises. If it is for the whole interest, it is more properly an assignment than a lease (b). While, on the other hand, if any portion of his estate at the end thereof is reserved by a tenant for years, the instrument will operate as an underlease (c). 1893.

Pr. III. T. 12,  
Ch. 2, s. 5.

Lease  
defined and  
disting-  
guished  
from an  
assignment  
and an  
underlease.

With reference to cases where it may appear difficult to determine whether a deed is a lease or only an agreement for one, if there are words and an apparent intent of present demise, and yet allusion is made to a lease to be executed at some future time, such instrument is construed to be an actual lease, with an agreement for further assurance. But where there appears no intent, though there are words of present demise, and the instrument seems only preparatory or relative to one to be afterwards made, it is only considered as an agreement for a lease (d). 1894.

Where a  
deed is a  
lease, or  
only an  
agreement  
for a lease.

The leaning of the Courts appears to be to construe an agreement as to letting as a present demise, and not a mere agreement for a future lease (e). And hence the words "agree to let" constitute a present demise, commencing at the date of the agreement, although no time

(a) As to leases by the Crown, ecclesiastical persons, colleges, and corporations, see Co. Litt. 44 b, 45 a; 2 Bl. Com. 318—322; Stamp's Index to the Statute Law; and the treatises on the subject of leases.

(b) 2 Bl. Com. 317; 2 Pres. Shep. T. 266; Watk. Conv. 3rd ed. by

Prest. 174; 1 Platt on Leases, 1—19.

(c) 2 Pres. Shep. T. 266.

(d) Sec 4 Cruise T. 34, c. 5, § 2—11; Burton, § 845; 1 Platt on Leases, 598.

(e) 2 Pres. Shep. T. 271.

PT. III. T. 12,  
CH. 2, s. 5. is named for the commencement of the tenancy, and although "a lease is to be drawn upon the usual terms," and the tenant "agrees" to take it upon the said terms (a). Where, therefore, it is not intended that an agreement should have the effect of a present demise, care must be taken to restrict its operation to that of a mere agreement for a future lease. 1895.

Who may  
lease.

All natural persons who are capable of alienating their property or of entering into contracts respecting it, may make leases, which will endure as long as their interest in the thing leased (b). 1896.

Leases by  
tenant for  
life, at the  
common  
law.

By the common law, a tenant for life (except under a power) cannot make a lease to continue longer than the period for which his own estate is limited; but, on the expiration of that period, a lease granted by him becomes absolutely void against the remainderman or reversioner, so as to be incapable of confirmation. And if A., lessee for the life of B., makes a lease for years by an indenture, and afterwards purchases the reversion in fee, and B. dies, A. may avoid his own lease (c). 1897.

Lease by  
tenant for  
life and  
remainder-  
man or re-  
versioner.

When the person in remainder or reversion joins with the tenant for life in making a lease, it is considered during the life of the tenant for life, as his lease, and as the confirmation of the remainderman or reversioner. After the death of the tenant for life, it is considered as the lease of the remainderman or reversioner, and as the confirmation of the tenant for life (d). 1898.

Leases by  
tenants in  
tail, or  
husbands  
seised in  
right of  
their wives,  
at the com-  
mon law.

By the common law, without a fine or recovery, tenants in tail could make no leases binding the issue in tail, or the remainderman or reversioner. Nor could a husband seised jure uxoris make an absolutely binding lease for any longer term than the joint lives of himself and his

(a) *Doe d. Phillip v. Benjamin*, n., 57, 73; 2 Pres. Shep. T. 268, 9 Ad. & E. 644; 1 P. & D. 440. 284; 1 Platt on Leases, 94—5.

(b) 4 Cruise T. 32, c. 5, § 25.

(d) Co. Litt. 45 a; 4 Cruise T.

(c) 4 Cruise T. 32, c. 5, § 55, 56 32, c. 5, § 56.



wife, even though she joined in the lease. For if a lease of the wife's lands were made by husband and wife, it would not bind the wife, if she survived her husband, nor her heirs, if she died in his lifetime (*a*). Where husband and wife make a lease of the wife's land, not according to the [stat. 40 & 41 Vict. c. 18 (Appendix), or the stat. 45 & 46 Vict. c. 38 (Appendix),] and not acknowledged under the stat. 3 & 4 Will. 4, c. 74, s. 79, and there is nothing to show that the parties contemplated an acknowledgment of the wife under that statute, so as conclusively to bind the wife and her heirs, the lease will be good for the term specified, during the husband's lifetime, and even if she survive him during the term, it will not be void, but only voidable at her option, on her doing some act to disaffirm it; and until she does such an act it will be good during the term, and the rent accrued during her lifetime may be recovered by her or her executors (*b*). 1899.

PT. III. T. 12,  
CH. 2, S. 5.

By the stat. 32 Hen. 8, c. 28, a tenant in tail might make leases to bind his issue, but not those in remainder or reversion. And a husband seised in right of his wife in fee simple or fee tail, provided the wife joined in such lease, might bind her and her heirs thereby. But, 1. The lease must have been by indenture. 2. It must have begun from the making, or day of the making, and not at any greater distance of time. 3. If there was any old lease in being, it must first have been absolutely surrendered, or have been within a year of expiring. 4. It must have been either for twenty-one years or three lives, and not for both. 5. It must not have exceeded the term of three lives, or twenty-one years. 6. It must have been of corporeal hereditaments; for no rent can be reserved out of incorporeal hereditaments by the common law, as

Leases  
under the  
stat. 32 Hen  
8, c. 28.

(*a*) 4 Cruise T. 32, c. 5, § 31;  
2 Pres. Shep. T. 281.

(*b*) *Toler v. Slater*, L. R. 3 Q. B.  
42.

Pr. III. T. 12,  
Ch. 2, s. 5.

the lessor cannot resort to them to restrain. 7. It must have been of lands and tenements let for the greater part of twenty years past. 8. Not less than the most usual and customary rent, for twenty years past, must have been reserved yearly on such lease. 9. Such leases must not have been made without impeachment of waste (a). 1900.

Copyholds  
not within  
the stat.  
32 Hen. 8,  
c. 28.

The stat. 32 Hen. 8, c. 28, does not extend to copyhold estates (b). 1901.

Leases by a  
tenant in  
tail not  
warranted  
by that  
statute.

All leases by tenants in tail, not warranted by the stat. 32 Hen. 8, c. 28, were good against the tenant in tail himself, but were voidable by the issue in tail, unless barred. But if the issue in tail accepted of rent or fealty, after the death of his ancestor, or brought an action for the rent, these acts would operate as a confirmation of the lease (c). And each issue in succession might, while the lease continued, affirm the lease for his time. But a lease avoided by the issue in any line of the succession, was avoided for ever (d). Leases made by tenants in tail were absolutely void as against the persons in remainder and reversion, and ipso facto determined on the death of the tenant in tail and failure of the issue in tail, according to the maxim, *Cessante statu primitivo, cessat et derivativus*: so that no acceptance of rent by them would operate as a confirmation (e). Leases by tenant in tail might, however, become indefeasible, as against the issue, by means of a fine with proclamations or a recovery duly suffered, and might become absolute and binding on the entire fee simple when the estate tail was by a common recovery enlarged into a fee simple (f). 1902.

(a) 2 Bl. Com. 319, 320; Co. Litt. 44 a, b; 2 Pres. Shep. T. 278

—9.

(b) 1 Jarm. & Byth. by Sweet, 433, n. (a).

(c) 4 Cruise T. 32, c. 5, § 70; 2

Pres. Shep. T. 268, 275, 284, 289; Burton, § 714.

(d) 2 Pres. Shep. T. 289.

(e) 4 Cruise T. 32, c. 5, § 71; 2 Pres. Shep. T. 268.

(f) 2 Pres. Shep. T. 284.

Leases made by husband and wife of the wife's land, though not conformable to the stat. 32 Hen. 8, c. 28, were only voidable and not void; and therefore acceptance of rent by the wife after her husband's death, would operate as a confirmation (*a*). An agreement for a lease by a husband and wife seised in right of the wife, would not be binding on the wife or her heirs, or her issue in tail, because the stat. 32 Hen. 8, c. 28, only authorises "leases" (*b*). 1903.

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Leases by  
husband  
and wife not  
warranted  
by the stat.  
32 Hen. 8.

This Act is repealed by the stat. 19 & 20 Vict. c. 120, s. 35, except so far as relates to leases by persons having an estate in right of their churches. 1904.

Repeal  
thereof.

By the stat. 19 & 20 Vict. c. 120, power was given to the Court of Chancery (even in the case of infants, lunatics, bankrupts, insolvents, and married women, ss. 36—8), to authorize leases, and preliminary contracts to grant leases, of settled estates, that is, of estates limited by any instrument or instruments (whether before or after the passing of the Act, s. 44), to or in trust for any persons by way of succession, or of any rights and privileges over or affecting any settled estates, subject to certain conditions (ss. 1, 2, 3, 6), unless an application for that purpose had been rejected by Parliament (s. 21); or unless it would be contrary to the intention of the settlor (s. 26); or beyond his power (s. 27); or unless in the case of leases of copyholds without the consent of the lord (s. 43). But no lease could be granted for more than 21 years, of any settled estate whereof the tenants in tail were debarred from defeating their estates tail, or where the reversion was in the Crown (s. 42). 1905.

Leases and  
agreements  
for leases  
under the  
stat. 19 & 20  
Vict. c. 120,  
etc.

By ss. 32, 33, 36—8, of the same statute (even in the case of infants, lunatics, bankrupts, insolvents, and married women), tenants for life, or for years determinable on lives

(*a*) 4 Cruise T. 32, c. 5, § 72;      (*b*) 1 Jarm. & Byth. by Sweet,  
Watk. Conv. 3rd ed. by Prest. 252.      427.

Pr. III. T. 12,  
Ch. 2, s. 5.

or for any greater estate, of property settled since the passing of the Act, and tenants by the curtesy, or in dower, or in right of their wives, of unsettled property, might, without application to the Court, make binding leases (except of the principal mansion and the land usually occupied therewith) for 21 years, in possession, subject to certain conditions, except in the case of copyholds without the consent of the lord. **1906.**

By ss. 7, 10, of the same statute, the Court of Chancery might vest powers of leasing settled estates in the trustees of the settlement or in any other persons. **1907.**

The Act was amended and extended by the stat. 21 & 22 Vict. c. 77 (*a*), and by the stat. 27 & 28 Vict. c. 45, so far as regards the 1st and 10th sections, and by the stat. 37 & 38 Vict. c. 33. [But this Act and the statutes amending and extending it are repealed by stat. 40 & 41 Vict. c. 18 (Appendix); and the leasing powers of tenants for life and other limited owners are now derived from the last-mentioned statute and stat. 45 & 46 Vict. c. 38 (Appendix) (*b*).] **1908.**

Lease by  
tenant in  
fee whose  
wife is  
endowed.

If a tenant in fee simple takes a wife, and then makes a lease for years, and dies, and the wife is endowed, the lease is void as against her, but will be good as against the heirs, etc., of the husband (*c*). **1909.**

Leases by  
joint  
tenants,  
tenants in  
common,  
and copar-  
ceners.

Joint tenants, tenants in common, and coparceners may make leases for life or years of their own shares, and these leases will bind their companions; and one joint tenant, coparcener, or tenant in common may make a lease of his or her part to the other (*d*). If joint tenants join in a lease, there will be but one lease; for they have but one freehold. But if tenants in common join in a lease, there will be several leases of their several interests (*e*). **1910.**

Operative  
words.

The words "grant," "demise," and "to farm let," are the

(*a*) See supra, par. 1615.

(*b*) See supra, par. 448 *a* et seq.

(*c*) 2 Pres. Shep. T. 275.

(*d*) 2 Pres. Shep. T. 268; supra,  
par. 612—617.

(*e*) 2 Pres. Shep. T. 268, n. (8).

most proper operative words in a lease for years ; but any words which show the intent of the parties that the one should divest himself of the possession, and the other come into it for a determinate time, are in general sufficient for the purpose (a). 1911.

PT. III. T. 13,  
CH. 2, s. 5.

There are some kinds of incorporeal hereditaments which may be leased. Thus, an advowson appendant may be leased with the manor to which it is annexed, or separate from it ; and an advowson in gross may also be leased (b). And tithes, whether in the hands of ecclesiastics or lay impropriators, might be leased (c). 1912.

Leases of  
incorporeal  
heredita-  
ments.

If a man is possessed of a term of years, although it be one hundred years or upwards, and grants to another, as a legal interest, all the residue of the term of years that shall be to come at the time of his death, this grant is void ; because terms for years being anciently very short, the common law will not presume that any part of the term will exist at the death of the grantor (d). 1913.

Grant of  
residue of  
term after  
death of  
termor.

A lease for life of anything whatsoever, whether it lie in livery or grant, if it is in esse before, cannot begin at a day to come, unless it lies in livery, and livery is not made till that day (e) ; or unless it is by way of remainder, or by way of grant of the reversion, or of a part of the reversion immediately expectant upon some other estate of freehold ; or unless it is a lease under the Statute of Uses, and not at the common law. 1914.

Lease for  
life in  
future.

In the case of leases for lives, the timber is included, unless excepted, so that the lessor must not fell them, because the lessee has by his lease a particular interest in the trees, such as the mast and fruit of them, and shade and shelter for his cattle, and may lop them, if they be not

Timber.

(a) Burton, § 838 ; 2 Bl. Com. 317 ; 4 Cruise T. 32, c. 5, § 2 ; Co. Litt. 45 b ; Watk. Conv. 3rd ed. by Prest. 18, 19, 178.

(b) 4 Cruise T. 32, c. 5, § 22.

(c) 4 Cruise T. 32, c. 5, § 23.

(d) 2 Pres. Shep. T. 251 ; see also *supra*, par. 839, 840.

(e) 2 Pres. Shep. T. 272 ; Watk. Conv. 3rd ed. by Prest. 170, 175.

Pr. III. T. 12,  
Ch. 2, s. 5.

thereby injured (a). Where the trees are excepted in the lease, as they usually are, the lessee has no interest whatever in them. The lessor also has power, as incident to the exception, to enter upon the land, in order to fell and take away the trees; though this power, for greater caution, is often expressly reserved (b). 1915.

Lessee not  
estopped by  
description.

A lessee is not estopped by the description of the lands contained in his lease; for this is not the essence of the deed. And he may therefore show that what is there called meadow has been sometimes ploughed (c). 1916.

Rent (d).

Whether any rent is reserved upon a lease for life or years or at will, or not, is not material, except in the case of leases made by virtue of any statute whereby rent is required to be reserved; or by ecclesiastical persons; or by persons leasing under powers requiring a reservation of rent (e). 1917.

If a lease is made reserving rent, payable quarterly, this shall be intended quarterly from the date of the lease, and not at the usual feasts (f). 1918.

Tithe and  
land tax.

In the absence of any stipulation on the subject, the tithe rent charge is payable by the landlord (g). 1919.

Where a lease was made at a yearly rent, "payable quarterly, free of all outgoings," the Vice-Chancellor Stuart held, that these words were not sufficient to relieve the lessor from the payment of the land tax and tithe rent charge; but Lord Campbell, C., held that the tenant must pay them (h). 1920.

Disagreeing  
to a term.  
Where  
entry is  
necessary.

Any person may disagree to a term for years (i). 1921.  
In leases for years at the common law, an actual entry is necessary to vest the estate in the lessee; for the bare lease does not give him an estate, but only a right to enter,

(a) 1 Cruise T. 3, c. 2, § 3.

(b) 1 Cruise T. 3, c. 2, § 4.

(c) 4 Cruise T. 32, c. 19, § 61.

(d) See *supra*, par. 41 et seq.,  
1788—1794.

(e) 2 Pres. Shep. T. 268.

(f) 3 Cruise T. 28, c. 1, § 50.

(g) *Parker v. Taswell*, 2 D. & J.  
559.

(h) *Parish v. Sleeman*, 1 Gif. 238;  
1 D. F. & J. 326.

(i) 4 Cruise T. 32, c. 26, § 9.

which is called his interest in the term, or interesse termini (a). And as the lessee has no estate till entry, so until entry the lessor's estate is not converted into a reversion (b). But where a term for years is created by way of use, the interest is made an estate by the statute without entry (c). **1922.**

PT. III. T. 12,  
CH. 2, s. 5.

Sometimes it is stipulated that the lessee shall not assign at all; in other cases, it is stipulated that he shall not assign without the assent of the lessor. **1923.**

Assignment  
or under-  
letting.

Where a lease provides that the lessee shall not assign or underlet without the consent in writing of the lessor, but that consent to an assignment or underlease to any respectable and responsible person shall not be withheld, it is not necessary to the validity of such an act that consent shall be *first* obtained (d). **1923a.**

A termor for years may assign or underlet, unless there be an express condition or provision in the lease to restrict the power of alienation which the law gives; and even in that case the lessee may assign or underlet, but the assignment will give to the reversioner the right of re-entry, if he think proper to avail himself of the condition. But he may dispense with the forfeiture, as by accepting rent, confirming, etc., and in that case the title of the assignee will be indefeasible (e). **1924.**

A tenant who has not stipulated that he will deliver up possession at the end of the term, is nevertheless bound to deliver up complete possession. And therefore, if, against his will, his under-tenant holds over, the landlord can recover against the tenant damages equal to the rent which he has lost, and the costs of bringing an ejectment (f). **1925.**

(a) 2 Bl. Com. 314; Burton, § 61; Co. Litt. 46 b; Watk. Conv. 3rd ed. by Prest. 175.

(b) Burton, § 61; Co. Litt. 46 b.

(c) Burton, § 131.

(d) *Hyde v. Warden*, L.R. 3 Ex. D. (Ap.) 72, 81.

(e) Watk. Conv. 3rd ed. by Prest. 21, 177.

(f) *Henderson v. Squire*, L. R. 4 Q. B. 170.

PT. III. T. 12,  
CH. 2, s. 5.

Where the owner of a term agrees to let for three years, and also, when called upon, to grant a lease for three years or seven years or the whole term, and the tenant continues in occupation beyond the first three years, and becomes bankrupt, and the trustee sells the bankrupt's estate and interest, the option of the tenant to take a lease is not to be regarded as having ceased at the end of the first three years, but it passes to the trustee, and from him to the purchaser (a). 1926.

Where it is stipulated that a lessee shall not assign without the assent of the lessor, it is sometimes provided that such assent shall not be arbitrarily withheld; and sometimes this provision against an arbitrary refusal of assent is by way of covenant; in other cases it is only by way of qualification of the stipulation requiring assent of the lessor. Where it is ambiguous, the Court will incline to construe the provision against arbitrary refusal to be a qualification of the words requiring the assent of the lessor and not a covenant by the lessor not arbitrarily to refuse. It qualifies the tenant's covenant not to assign without assent, so as to absolve him from the need of assent if arbitrarily withheld (b). 1927.

An arbitrary refusal is equivalent to an unfair and unreasonable refusal (c). 1928.

Conditions  
against  
assignment  
(d).

If a lease for years is made on condition that the lessee shall not assign or alien the term or the land during his life without the licence of the lessor, and the lessee gives it by his will without licence, this is a breach of the condition, and a forfeiture of the estate. But if a lease is made on condition that the lessee shall not alien without the licence of the lessor, so as to be personal to him, and afterwards the lessor dies, and the lessee assigns; or the

(a) *Buckland v. Popillon*, L. R. 2 Ch. Ap. 67.

(b) *Treloar v. Bigge*, L. R. 9 Ex. 151.

(c) *Treloar v. Bigge*, L. R. 9 Ex. 151.

(d) As to the apportionment of such conditions, see *supra*, par. 185, 186.



lessee dies, and his executors or administrators assign ; Pt. III. T. 12,  
CH. 2, s. 5.  
there is no breach of the condition in either of these cases (a). And where there is a condition that the lessee shall not assign it over without permission, an underlease is not within the condition (b). **1929.**

Where a lessee covenanted not to alien or transfer his lease, and afterwards acknowledged a judgment, on which the lease was taken in execution and sold, it was held that this sale was not a forfeiture of the lease (c). But where a warrant of attorney to confess a judgment is given by collusion for the purpose of enabling a creditor to take a lease in execution, it will be a breach of such a covenant (d). **1930.** Covenant  
not to alien.

Where a lease is subject to a covenant that neither the lessee nor his assigns should assign without the consent of the lessor, and the lessee assigns, with the consent of the lessor, to two partners, and one of them, on the dissolution of the partnership, assigns all his interest to the other, it is a breach of the covenant (e). **1931.**

Where a lessee, subject to a covenant not to assign without the lessor's consent, obtains such consent, and agrees to grant an underlease to contain the like provisions as the lease, it was held by the Lords Justices, that the original lessee (and not the original lessor) is the person whose consent must be required in the covenant in the underlease (f). **1932.**

A covenant by lessees, for themselves, their heirs, executors, administrators, and assigns, that they, their executors, administrators, and assigns, would not assign without the lessor's consent, is a covenant which touches and concerns the land, and, therefore, runs with the land, and the lessor

(a) 1 Pres. Shep. T. 144, 145.

(b) 2 Cruise T. 13, c. 1, § 42 ;  
Watk. Conv. 3rd ed. by Prest. 21.

(c) Cruise T. 13, c. 1, § 46.

(d) 2 Cruise T. 13, c. 1, § 48.

(e) *Varley v. Coppard*, L. R. 7

C. P. 505.

(f) *Williamson v. Williamson*, L.  
R. 9 Ch. Ap. 729, overruling deci-  
sion of *Bacon*, V.-C., 17 Eq. 549.

PR. III. T. 12,  
CH. 2, s. 5.

can sue an assignee of the lessees for the breach of it (a). Similar covenants relating to things fixed to the land also run with the land (b). 1933.

Covenant to  
perform  
covenants  
in original  
lease.

A covenant in a sublease to perform all the covenants in the original lease, is a covenant to perform those covenants whilst the original term is unexpired and unsurrendered: it is not a covenant to do or abstain from doing the acts mentioned in those covenants, so as to apply, even after a new lease is taken, in which those covenants are omitted (c). 1934.

Usual  
covenants  
and clauses.

The party agreeing to take a lease has a right to a lease containing only usual covenants, or such as are provided for. A covenant in restraint of trade in a trade locality is not a usual covenant (d). Nor is a covenant not to assign or underlet (e). 1935.

A power of re-entry if the lessee or his assigns become bankrupt, or make a composition with creditors, or if execution should issue against either of them, is unusual, and the lessor is not entitled to have it inserted (f). 1935a.

Under a contract for a lease to contain all usual covenants, particularly a covenant to keep the premises in good repair, it has been held that the lessee is not entitled to have introduced the words "damages by fire or tempest only excepted" (g). 1936.

Under an agreement for a lease to contain "all usual and customary clauses," the landlord is not entitled to have inserted in the lease a proviso for re-entry "on breach of any of the covenants by the lessee"; but he is entitled to

(a) *Williams v. Earle*, L. R. 3 Q. B. 739.

(b) *Williams v. Earle*, L. R. 3 Q. B. 739.

(c) *Piggott v. Stratton*, 1 Johns. 341.

(d) *Propert v. Parker*, 1 My. & K. 280; *Wilbraham v. Livesey*, 18 Beav. 206; *Hyde v. Warden*, L. R.

3 Ex. D. (Ap.) 72.

(e) *Watk. Conv.* 3rd ed. by Prest. 177; *Hampshire v. Wickens*, L. R. 7 Ch. D. 555.

(f) *Hyde v. Warden*, L. R. 3 Ex. D. (Ap.) 72.

(g) *Sharp v. Milligen*, 23 Beav. 419.

have a clause of re-entry for breach of covenants generally, or on non-payment of rent (a). 1937.

PT. III. T. 12,  
CH. 2, s. 6.

It is very common, in farming leases, to covenant not to mow meadow land more than once a year. On the other hand, it is very common to except from the operation of such a covenant cases when an equivalent in manure is brought on the land. But the omission of this exception is not sufficient to make the covenant not to mow oftener so unusual or unreasonable as to give the lessee a right to object to it (b). 1937a.

The assignee of a lease cannot, by assigning over, get rid of his liabilities for breaches of covenant committed during the period of his own occupation. And hence, if the assignee of a lease devises the leasehold, although the devisee may take it subject to the liability to do repairs which were wanted at the death of such assignee, yet the executors of the assignee are still liable, as between themselves and the lessor; and they are entitled to have an indemnity in respect of such liability before the devisee is let into possession (c). And, except so far as the stat. 22 & 23 Vict. c. 35, s. 27, may protect them, executors of an assignee are entitled to have a fund set apart out of the assets for their indemnity, on their assigning to a purchaser, though he covenant to perform the covenants and to indemnify (d). But, as we have seen, the obligation of the lessee's covenants, though it will pass to an assignee of the whole term, is not communicated to an underlessee (e). 1938.

Obligation  
of lessee's  
covenants.

Indemnity  
to executor  
of assignee.

By the stat. 4 Geo. 2, c. 28, s. 6, reciting that leases for lives or years could not be renewed without a surrender of all the underleases derived out of the same, it is enacted

Renewal (f).

(a) *Hodgkinson v. Crowe*, L. R. 10 Ch. Ap. 622.

(b) *Hyde v. Warden*, L. R. 3 Ex. D. (Ap.) 72, 82.

(c) *Hickling v. Boyer*, 3 Mac. & G. 635.

(d) *Brewer v. Pocock*, 23 Beav. 310; see *supra*, par. 1815.

(e) See *supra*, par. 1818—1821.

(f) See stat. 23 & 24 Vict. c. 145, ss. 8, 9; *infra*, Part IV. Tit. 1, c. 2.

PT. III. T. 12,  
CH. 2, s. 5.

that all future renewals of leases for lives or years shall be valid without the surrender of any derivative leases (a). 1939.

By the stat. 1 Will. 4, c. 65, s. 18, if persons bound to renew are out of the jurisdiction of the Court, renewals are directed to be made by a person appointed by the Court of Chancery in the name of the person who ought to have renewed. 1940.

When a renewable leasehold estate is devised to trustees in trust for one person for life, remainder in trust for another for life, remainder in trust for a third person, with a direction to renew, and pay the fine out of the rents and profits, it seems to be the duty of the trustees to provide an accumulating fund out of the rents and profits during the enjoyment of the first tenant for life, to answer the renewals to be made in his time, and to pursue the same conduct during the life of the second tenant for life (b). 1941.

Where a testator gives his leaseholds to trustees for legatees in succession, and upon trust that, "if the trustees shall think it proper or advantageous, as to those which are customarily or may be renewed, they shall or lawfully may endeavour to effect renewals upon such terms as they shall think proper;" this does not make it compulsory on the trustees to renew, if they can by possibility obtain a renewal; for then they would be compelled to pay any sum, however unreasonable, which might be demanded by the lessor. Yet, on the other hand, it does not give them a discretion to refrain from exercising the power of renewal at their arbitrary will and pleasure. But it imposes on them the duty of endeavouring to effect a renewal, if they can do so on reasonable terms (c). 1942.

(a) 4 Cruise T. 32, c. 5, § 59.

(b) 1 Rep. Leg. by White, 319.

(c) *Mortimer v. Watts*. 14 Beav. 616.

The right of renewal may be forfeited by the laches of the tenant in not applying for a renewal within the time mentioned in the lease (a). **1943.**

PT. III. T. 12,  
CH. 2, s. 5.

In the absence of any expressions to the contrary, where a renewal becomes impracticable, the fund reserved by the trustees out of rents for the purpose of renewal, belongs absolutely to the tenant for life (b). **1944.**

Covenants for renewal are frequently inserted in leases, and are of two kinds: covenants for granting another lease of the thing demised; and covenants for renewal, not only on the expiration or surrender of the original lease, but also on the expiration or surrender of all future leases made under such a covenant, which is usually called a covenant for perpetual renewal (c). A covenant for renewing a lease under the same covenants means only a second lease under the same covenants as the former, with the exception of the covenant for renewal (d). And where a person grants a lease, with a covenant for perpetual renewal, and an agreement that the new lease and leases should contain the same rents, covenants, etc., as were contained in the lease so granted by him, and his trustees grant a new lease, they are not required to introduce a covenant by themselves for renewal, but the proper form is for them to recite the original covenant for perpetual renewal, and to declare the new lease to be granted in pursuance of it (e). **1945.**

Covenant  
for renewal.

If a lessee for life or years takes a new lease of the same land, and one term is incompatible with the other, as embracing part of the same period, this is a surrender in law of the first lease. And this rule applies although the second lease be for years, where the first was for

Effect of  
taking a  
new lease.

(a) 4 Cruise T. 32, c. 25, § 111.

Watk. Conv. 3rd ed. by Prest. 178.

(b) *Morres v. Hodges*, 27 Beav.

(c) *The Copper Mining Company*

625.

*v. Beach*, 13 Beav. 478; decided by

(c) 4 Cruise T. 32, c. 25, § 98.

Sir J. Leach; *Hodges v. Blagrave*,

(d) 4 Cruise T. 32, c. 25, § 103;

18 Beav. 587.

PT. III. T. 12,  
CH. 2, S. 5.

life; or although the second lease be for a less number of years than the first; and although the second lease be voidable as being made upon condition; and although the second lease be to the lessee and a stranger, or to the lessee and his wife; and although the second lease be by word only, and the first lease be by deed, so far as such second lease by word may be valid; and although the second lease be in another right (as if the husband have a lease for years in right of his wife, and then take a new lease to himself in his own name); and although the first lease was to begin presently and the second lease is to begin at a day to come, or e converso (a). But if the second lease is not to begin until the first lease end, the taking of the second lease is no surrender of the first lease (b). And in the case of a surrender implied by law from the acceptance of a new lease, a condition ought also to be understood as implied by law, making void the surrender in case the new lease should be made void (c). And in the case of an express surrender, so worded as to show the intention of the parties to make the surrender only in consideration of the grant, such surrender is also conditional to be void in case the grant should be made void (d). 1946.

Lease of  
charity  
property.

A lease of charity property for ninety-nine years, at a fixed rent, not being a building lease, and containing no contract to repair or lay out money thereon, is invalid (e). And a building lease of charity property for more than ninety-nine years cannot stand, unless there is some special ground on which it can be protected (f). 1947.

Construc-

A lessee is bound to inquire into, and is bound by all

- |  |   |
|--|---|
| (a) 2 Pres. Shep. T. 301.  | <i>Courtenay</i> , 11 Ad. & E. (N. S.) 702.                   |
| (b) 2 Pres. Shep. T. 302.  | (e) <i>Att.-Gen. v. Foord</i> , 6 Beav.                       |
| (c) <i>Doe d. Earl of Egremont v. Courtenay</i> , 11 Ad. & E. (N. S.) 702. | 288; <i>Att.-Gen. v. Hotham</i> , 3 Russ. 415.                |
| (d) <i>Doe d. Earl of Egremont v.</i>                                      | (f) Lord Langdale in <i>Att.-Gen. v. Foord</i> , 6 Beav. 290. |

covenants into which his lessor has entered (a). And a person contracting for an underlease has notice of all the covenants contained in the original lease, or at least of those which are usual in leases of property of that description, so far as he has had reasonable opportunity of ascertaining what they were, and he will be bound to take an underlease subject to those covenants (b). 1948.

Pr. III. T. 12,  
Ch. 2, s. 5.

tive notice  
of cove-  
nants.

Where a parol contract is made for the grant of an underlease, subject to a question of title, possession taken with the knowledge and consent of the grantor is not of itself a waiver of an objection to title by the grantee, but it is only evidence of acceptance of the title, which may be rebutted by other circumstances (c). 1948a.

A right of entry in a lease cannot be reserved to a stranger; and therefore if it appears upon the face of the lease that the legal estate is in a mortgagee or a trustee for him, and the right of entry is reserved to the mortgagor, it will be void (d). 1949.

Right of  
entry.

By the general custom of all manors, every copyholder may make a lease for any term of years, if he can obtain a licence from the lord; and even without such licence, he may demise his tenement for one year; and the interest thus created is not of a customary nature, but a common law term (e). The lord of a manor cannot authorize an equitable tenant of a copyhold to demise; because there is no privity of estate between them (f). [Except under stat. 45 & 46 Vict. c. 38 (Appendix),] the lord can only grant a licence to lease during the continuation of his own estate in the manor. Therefore

Leases of  
copyholds.

(a) *Filder v. Slater*, L.R. 7 Eq. 523.

D. (Ap.) 72.

(b) See *Cosser v. Collinge*, 3 My. & K. 283; *Wilbraham v. Livesey*, 18 Beav. 206; *Hyde v. Warden*, L.R. 3 Ex. D. (Ap.) 72, 80.

(d) Coote Mortg. 3rd ed. 338.

(e) Burton, § 1313; 1 Cruise T. 10, c. 3, § 18.

(c) *Hyde v. Warden*, L.R. 3 Ex.

f) 1 Jarm. & Byth. by Sweet, 483, n. (a).

PT. III. T. 12,  
CH. 2, s. 5.

a lease for years made by licence of a lord who is only tenant for life [and is not affected by the provisions of that statute,] will cease at his death (a). In the case of a lease by licence of the lord, the lessee may assign it, or make an underlease for years without any new licence; for the lord's interest is discharged for so many years. And if the copyholder should die without heirs, still the lease would stand against the lord, by reason of his licence, which amounts to a confirmation (b). A lease made contrary to the custom of a manor is good against all but the lord; and even as against him it is not void, but only a ground of forfeiture, which he may waive (c).  
1950.

Licences to  
copyholders  
for leasing.

[It is now enacted by stat. 45 & 46 Vict. c. 38, s. 14 (Appendix), that "(1) A tenant for life may grant to a tenant of copyhold or customary land, parcel of a manor comprised in the settlement, a licence to make any such lease of that land, or of a specified part thereof, as the tenant for life is by this Act empowered to make of freehold land. (2) The licence may fix the annual value whereon fines, fees, or other customary payments are to be assessed, or the amount of those fines, fees, or payments. (3) The licence shall be entered on the court rolls of the manor, of which entry a certificate in writing of the steward shall be sufficient evidence." ] 1950a.

Leases must  
be by deed.

By the stat. 7 & 8 Vict. c. 76, s. 4, it is enacted, "that no lease in writing of any freehold, copyhold, or leasehold land shall be valid as a lease unless the same shall be made by deed: but any agreement in writing to let any such land shall be valid and take effect as an agreement to execute a lease; and the person who shall be in the possession of the land in pursuance of any agreement to let may, from payment of rent or other circumstances, be

(a) 1 Cruise T. 10, c. 3, § 20.  
(b) 1 Cruise T. 10, c. 3, § 19.

(c) *Doe d. Robinson v. Bousfield*,  
6 Ad. & E. (N. S.) 492.



construed to be a tenant from year to year." This was repealed as from the 1st of October, 1845, by the stat. 8 & 9 Vict. c. 106. But by s. 3 of that Act, it is enacted that "a lease required by law to be in writing (a), of any tenements or hereditaments, made after the 1st of October, 1845, shall be void at law, unless made by deed." Although an instrument may be void as a lease at law in consequence of this enactment, yet it may be enforced as an agreement in equity (b); or it may be used to prove the terms on which the tenant holds as constructive tenant from year to year; and hence the tenancy, which may be determined, during the period for which the lease was to last, by a half-year's notice at the proper time, will, at the end of that period, expire without notice (c). And if an instrument purporting to create a lease for seven years is not sealed, and the intended lessee enters under it, he is liable, even at law, to perform the things stipulated to be done during the last year (unless the holding is determined before by a proper six months' notice), as well as those things which were to be done during the first year (d). 1951.

PT. III. T. 12,  
CH. 2, s. 5.

By the stat. 7 & 8 Vict. c. 76, s. 12, it is enacted, "that where the reversion of any land, expectant on a lease, shall be merged in any remainder or other reversion or estate, the person entitled to the estate into which such reversion shall have merged, his heirs, executors, administrators, successors, and assigns, shall have and enjoy the like advantage, remedy, and benefit against the lessee, his heirs, successors, executors, administrators, and assigns, for non-payment of the rent, or for doing of waste or other for-

Where remedies for rent, covenants, and conditions, in a lease not to be extinguished by the merger of the immediate reversion.

(a) See *supra*, par. 1694—7.

(b) *Parker v. Tasmell*, 2 D. & J. 559.

(c) *Tress v. Savage*, 4 El. & Bl. 36; see also *Doe d. Darenish v. Moffatt*, 15 Q. B. 257, in which there

was a similar decision, under the stat. 7 & 8 Vict. c. 76, s. 4. And see *Tidey v. Mollett*, 16 C. B. (N. S.) 298; *Hayne v. Cummings*, Id. 421.

(d) *Martin v. Smith*, L. R. 9 Ex. 50.

PT. III. T. 12,  
CH. 2, s. 5.

When the  
reversion on  
a lease is  
gone, the  
next estate  
to be  
deemed the  
reversion.

feiture, or for not performing conditions, covenants, or agreements contained and expressed in his lease, demise, or grant, against the lessee, farmer, or grantee, his heirs, successors, executors, administrators, and assigns, as the person who would for the time being have been entitled to the mesne reversion which shall have merged would or might have had and enjoyed if such reversion had not been merged." This was repealed as from the 1st of October, 1845, by the stat. 8 & 9 Vict. c. 106. But by s. 9 of that Act, it is enacted, "that when the reversion expectant on a lease made either before or after the passing of this Act, of any tenements or hereditaments of any tenure, shall, after the said 1st day of October, 1845, be surrendered or merge, the estate which shall for the time being confer as against the tenant under the same lease the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion, as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease." 1952.

Stat. 44 & 45  
Vict. c. 41,  
ss. 10—12.  
The Convey-  
ancing and  
Law of  
Property  
Act, 1881.

[And now by stat. 44 & 45 Vict. c. 41, ss. 10—12 (Appendix), it is provided with respect to leases made after the commencement of that Act, that, "Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term

to the income of the whole or any part, as the case may require, of the land leased" (s. 10). Also that, "The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise, and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled" (s. 11). And that, "Notwithstanding the severance by conveyance, surrender or otherwise, of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition, contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in any land which has not been surrendered, or as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease" (s. 12).] 1952a.

Where the lease and its counterpart exhibit an irreconcilable discrepancy, the former, as the principal,

PT. III. T. 12,  
CH. 2, s. 5.

shall generally prevail. And where the habendum and reddendum differ as to the duration of the term, the habendum shall generally prevail; it being the office of the habendum and not of the reddendum to define the duration of the estate. But the lease and the counterpart form one document, and if there is a mistake in the lease on the face of it, the counterpart may be resorted to, in order to correct that mistake (a). 1953.

## SECTION VI.

### *Of an Exchange (b).*

PT. III. T. 12,  
CH. 2, s. 6.

Definition.

An exchange is an arrangement between two persons, or between two classes of persons by each of which property is held in community, that each person or class shall divest himself, herself, or themselves of his, her, or their own property in favour of the other, and in lieu thereof shall take the property of the other. 1954.

Requisites  
to an ex-  
change at  
common  
law.

To the validity of exchanges at common law, five things are requisite: 1. That the two subjects be of the same general nature. Thus, real estate cannot be exchanged for personal estate: but real estate of one kind may be exchanged for real estate of another kind; so that corporeal hereditaments may be exchanged for incorporeal hereditaments (c). 2. That the parties take estates of the same general denomination, as regards the quantity of interest. Thus, an estate in fee simple cannot be exchanged for an estate tail, or either of them for an estate for life. But an estate in fee simple may be

(a) *Burchell v. Clark*, L. R. 1 C. P. D. 602; 2 C. P. D. 88.

(b) Powers of exchange are conferred by various statutes, as to which see Stamp's Index to the Statute Law, tit. "Exchange"; Burton, § 240; and see *Minet v. Ieman*, 20 Beav. 269; 7 D. M. &

G. 340. As to exchanges, reserving or excepting minerals, see stat. 25 & 26 Vict. c. 108, *infra*, Part IV. Tit. 1, c. 2.

(c) 4 Jarm. & Byth. by Sweet, 1; Co. Litt. 50 b; 4 Cruise T. 32, c. 6, § 4; 2 Pres. Shep. T. 293—4.

exchanged for a base fee. And if a tenant in tail grants PT. III. T. 12,  
CH. 2, s. 6. lands in fee, so as to give a base fee in exchange with a tenant in fee, this is a good exchange until avoided by the issue. And an estate tail after possibility of issue extinct may be exchanged for an ordinary estate for life, as both are of the same duration (*a*). 3. The word "exchange" must be used (*b*). 4. Entry (but not livery of seisin) is also requisite to give effect to an exchange; and therefore if either party die before entry, his heir may avoid the exchange (*c*). 5. An exchange, since the Statute of Frauds (29 Car. 2, c. 3), must be in writing, and even before the statute 7 & 8 Vict. c. 76, if the hereditaments whereof the exchange was made consisted of reversions, rents, or other incorporeal hereditaments, or if they lay in several counties, it must have been by deed (*d*). And by the stat. 7 & 8 Vict. c. 76, s. 3, it was enacted, "that no exchange of any freehold or leasehold land shall be valid at law, unless the same shall be made by deed." And although this enactment was repealed by the stat. 8 & 9 Vict. c. 106, yet by s. 3 of that statute, it is enacted, "that an exchange of any tenements or hereditaments, not being copyhold, made after the 1st day of October, 1845, shall be void at law, unless made by deed." 1955.

It is not necessary that both estates be in possession; for an estate in possession may be exchanged for an estate in reversion. Neither is it necessary that there be an equality in the value or quantity of the lands. For if

(*a*) 4 Jarm. & Byth. by Sweet, 1, 2; 2 Pres. Shep. T. 295; 4 Cruise T. 32, c. 6, § 3, 4; 1 Cruise T. 4, § 9; Burton, § 63; 2 Bl. Com. 126, 323; Co. Litt. 28 a, 51 a.

(*b*) Co. Litt. 51 b; 4 Jarm. & Byth. by Sweet, 2; Burton, § 63; Watk. Conv. 3rd ed. by Prest. 181.

(*c*) Co. Litt. 50 b, 51 b; 2 Pres. Shep. T. 297; 4 Jarm. & Byth. by Sweet, 2; 4 Cruise T. 32, c. 6, § 6; Burton, § 63; 2 Bl. Com. 323; Watk. Conv. 3rd ed. by Prest. 179, 180.

(*d*) 4 Jarm. & Byth. by Sweet, 1, 2; Co. Litt. 50 a, 51 b; Watk. Conv. 3rd ed. by Prest. 180.

PT. III. T. 12,  
CH. 2, s. 6.

the land of one party be worth 100*l.*, and the land of the other but 10*l.*, or if the land of one of the parties be 100 acres and the land of the other but 10 acres, the exchange is good. Neither is equality in the quality or manner of the estate requisite. For an estate in joint tenancy may be exchanged for an estate in severalty or in common. And if A., tenant for life, and B., the owner of the remainder or reversion in fee, exchange with tenant in fee, and grant to him in fee, while he grants to them, to hold to A., the tenant for life, with remainder to B. in fee, the exchange is good. And if the land of one of the parties is of a defeasible title, and the land of the other of an indefeasible title, this exchange is good till it be avoided (*a*). 1956.

Nor is it necessary that the things exchanged should be in esse at the time of exchange; for a man may grant a rent de novo out of his land in exchange for a manor. But a mere hope or chance of succession cannot be exchanged for an estate (*b*). 1957.

An exchange in the strict legal sense of the word cannot be between three persons in respect of three distinct properties; the principles of it not being applicable to more than two distinct contracting parties, for want of the mutuality and reciprocity on which its operation so entirely depends. But if a tenant for life, and a remainderman in fee, exchange with a tenant in fee, or if two joint tenants exchange with a sole tenant such exchanges are good (*c*). 1958.

Implied  
warranty.

By the old law, in every deed of exchange in which the word "exchange," was used, there was an implied warranty arising from that word (*d*). So that if an exchange was made, and before or after the parties

(*a*) 2 Pres. Shep. T. 296 ; 4 Cruise T. 32, c. 6, § 3, 4 ; Co. Litt. 51 a.

(*b*) 2 Pres. Shep. T. 293.

(*c*) Co. Litt. 50 b, n. 1, 51 a, n. 1 ; Watk. Conv. 3rd ed. by Prest. 181.

(*d*) 4 Cruise T. 32, c. 6, § 8.

PT. III. T. 12,  
CH. 2, s. 6.

entered, all or part of the land given to either party was recovered from him either absolutely or for a particular estate only, upon an elder title, that party might enter again upon his own land which he gave in exchange, and either avoid the whole exchange, or recover an equivalent portion thereof (*a*). But the benefit of this implied warranty under the old law was confined to the parties themselves and their heirs, and did not extend to alienees, except for their defence as against the heir of the person against whom the warranty was implied. If therefore either party aliens, either by deed or will the remedy is gone from that party, but only as to him; for the other party who has not alienated, or his heirs, may still, in case of eviction from his lands, enter upon the alienee, notwithstanding the want of a reciprocal remedy (*b*). A mere defect of title, however, without an eviction, will not defeat an exchange (*c*). 1959.

By the stat. 7 & 8 Vict. c. 76, s. 6, it was enacted, that the word exchange should not have the effect of creating any warranty or right of re-entry, nor any covenant by implication. And although this was repealed by the stat. 8 & 9 Vict. c. 106, as from the 1st of October, 1845, yet by s. 4 of that statute it is enacted, that an exchange of any tenements or hereditaments, made by deed executed after the 1st of October, 1845, shall not imply any condition in law. 1960.

The modern practice has been to effect an exchange of real estate by lease and release, statutory release, or statutory grant, containing mutual conveyances to the parties; in which case the estates are vested in the parties by the operation of a statute, without any entry; and yet if the word "exchange" was used, the incidents

Exchanges  
by lease and  
release,  
statutory  
release, or  
statutory  
grant.

(*a*) 2 Pres. Shep. T. 290, 298; 4 Jarm. & Byth. by Sweet, 3.  
(*b*) 2 Pres. Shep. T. 291; 4 Jarm.  
(*c*) 2 Pres. Shep. T. 298.

**PR. III. T. 12,**  
**CH. 2, s. 6.** annexed to an exchange at common law were preserved (a).  
**1961.**

**Exchange  
under a  
power.**

Where an exchange is made under a power of sale and exchange, although the power is silent as to paying money for owelty of exchange, yet the donees of the power may make such payment. And the death of one of the parties to such an exchange before the transaction is completed, will not invalidate a legal execution of the power (b). **1962.**

**Exchange  
by tenant in  
tail.**

When an exchange is made by a tenant in tail, the issue in tail, after the death of his ancestor, may avoid it. And the persons in reversion or remainder may treat the exchange as void, and avail themselves of their title (c). But if the issue occupies the lands taken in exchange by his ancestor, the exchange is thereby made good for the lifetime or ownership of the issue in tail. And each successive generation of issue may affirm the exchange for his, her, or their time (d). **1963.**

**Exchange  
under stat.  
45 & 46 Vict.  
c. 38, s. 3  
(iii.). The  
Settled Land  
Act, 1882.**

[Under stat. 45 & 46 Vict. c. 38, s. 3 (iii.) (Appendix), a tenant for life may make an indefeasible exchange of settled land, for other land, including an exchange in consideration of money paid for equality of exchange. And this power is also conferred on the other limited owners, including tenants in tail, mentioned in section 58 of that Act.] **1963a.**

## SECTION VII.

### *Of a Partition (e).*

**PR. III. T. 12,**  
**CH. 2, s. 7.**

**Definition.**

A partition is a deed by which two or more joint tenants, coparceners, tenants in common, or heirs in

(a) 4 Cruise T. 32, c. 6, § 7 ; 4 Jarm. & Byth. by Sweet, 6 ; Watk. Conv. 3rd ed. by Prest. 180. See enactment stated infra, par. 1968, as to decrees for exchanges.

(b) 2 Sugd. Pow. 482.  
(c) 2 Pres. Shep. T. 299.  
(d) 2 Pres. Shep. T. 299.  
(e) Powers of partition are conferred by various statutes. See



gavelkind, divide the property, so as to give to each a distinct part, to be held in severalty. 1964.

Pr. III. T. 12,  
Ch. 2, s. 7.

Where all the joint owners of an estate are desirous to make a partition, and are personally competent to bind their interests, they have only to agree on the allotments to be made to the respective parties, and to execute the requisite conveyance or conveyances (a). 1965.

Voluntary  
partition by  
persons  
competent  
to bind their  
interests.

If any of the joint owners, whether joint tenants, tenants in common, coparceners, or heirs in gavelkind, are unwilling to concur with the rest in making partition, or by reason of minority or mental imbecility are incapable of concurring, or for any other cause cannot come to any amicable arrangement for dividing the estate, any one or more of them may, by proceedings in equity, procure a partition to be made (b). And this power of the Court is expressly extended to lands of copyhold or customary tenure by the statute 4 & 5 Vict. c. 35, s. 85. 1966.

Compulsory  
partition.

The mode in which relief is administered in equity is, by first ascertaining the rights of the several parties interested; and then issuing a commission to make the partition; and, on the return of the commission and confirmation of the return by the Court the partition is finally completed by mutual conveyances of the lots made to the several parties (c). And the same conveyances are necessary as if the parties had agreed to a private partition (d). Formerly, if the conveyances could not be executed on account of infancy, or on account of an executory interest, the decree could only put the

Stamp's Index to the Statute Law. As to partitions, reserving or excepting minerals, see stat. 25 & 26 Vict. c. 108, *infra*, Part IV. Tit. 1. Ch. 2. As to whether a power of sale or exchange authorizes a partition, see *In re Frith and Osborne*, L. R. 3 Ch. D. 618.

(a) 6 Jarm. & Byth. by Sweet, 586.

(b) 6 Jarm. & Byth. by Sweet, 587, 600, 603.

(c) Story's Eq. Jur. § 650; 6 Jarm. & Byth. by Sweet, 600.

(d) 6 Jarm. & Byth. by Sweet, 609.

Pt. III. T. 12,  
Ch. 2, s. 7.

parties in possession, and secure them in the enjoyment of the parts allotted to them until effectual conveyances could be made (*a*). The Court would decree a partition even in a suit by or against persons who were only tenants for life or years ; and the decree would be binding on all whom they virtually represented, but not on other persons. Thus, a decree in a suit by or against a tenant for life would be binding on the remainderman who was not in esse at the time, on the ground of virtual representation, if the Court was of opinion that it would be for the benefit of such remainderman that the agreement should be carried into effect, either as it stood, or with such variations as the Court might think proper (*b*). But a tenant for years or for life could not insist, as against the owners of the other shares, upon a partition to endure beyond his own estate (*c*). 1967.

Court to  
declare what  
parties are  
trustees of  
lands com-  
prised in  
any suit,  
and as to the  
interests of  
persons  
unborn.

By the stat. 13 & 14 Vict. c. 60, s. 30, " where any decree shall be made by any Court of Equity for the specific performance of a contract concerning any lands, or for the partition or exchange of any lands, or generally when any decree shall be made for the conveyance or assignment of any lands, either in cases arising out of the doctrine of election or otherwise, it shall be lawful for the said Court to declare that any of the parties to the said suit wherein such decree is made are trustees of such lands, or any part thereof, within the meaning of this Act, or to declare concerning the interests of unborn persons who might claim under any party to the said suit, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which such decree is made, that such interests of unborn persons are the

(*a*) Story's Eq. Jur. § 652 ; 6  
Jarm. & Byth. by Sweet, 609.

(*c*) 6 Jarm. & Byth. by Sweet,  
603.

(*b*) Story's Eq. Jur. § 656, 656 a.

interests of persons who upon coming into existence would be trustees within the meaning of this Act; and thereupon it shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, as the case may be, to make such order or orders as to the estates, rights, and interests of such persons, born or unborn as the said Court or the said Lord Chancellor might under the provisions of this Act make concerning the estates, rights, and interests of trustees born or unborn." 1968.

Pr. III. T. 12,  
Ch. 2, s. 7.

By the stat. 31 & 32 Vict. c. 40, amended by the stat. 39 & 40 Vict. c. 17, the [Chancery Division of the High Court of Justice] may order a sale, instead of a division. And jurisdiction, in cases of partition of property not exceeding 500*l.*, is given to the County Courts. 1969.

Sale.

Jurisdiction  
of County  
Courts.

A partition of estates of freehold or inheritance is effected either by all the joint tenants, tenants in common, coparceners, or heirs in gavelkind, conveying the particular allotments by separate deeds to releasees or grantees to the use of the particular persons to whom they are respectively allotted (*a*); or by all of them conveying the entirety by one conveyance to a releasee or grantee to uses, and then limiting, by the same deed, the particular allotments to the use of the particular persons to whom they are respectively allotted (*b*). 1970.

Modes of  
effecting  
partition by  
conveyance  
of freeholds.

A partition of leaseholds has been usually effected by an assignment of the entirety by all the part owners to a third person, upon trust to assign to them respectively the parts to be taken by them in severalty, or by an assignment by each joint owner to the others of his undivided share in the parts to be so taken by them in severalty (*c*). 1971.

Mode of  
effecting  
partition by  
assignment  
of lease-  
holds.

Every distinct part of the property need not be divided; Mode of  
division

(*a*) 6 Jarm. & Byth. by Sweet, 595.

(*c*) 6 Jarm. & Byth. by Sweet,

(*b*) 6 Jarm. & Byth. by Sweet, 596. 618.

PT. III. T. 12,  
CH. 2, s. 7.

nor need the property be equally divided. One part or subject of ownership (as a house) may be allotted to one, and another part or subject of ownership may be allotted to another; and any inequality in value may be compensated by a sum of money or rent for owelty or equality of partition (*a*). 1972.

Partition by  
infants,  
tenants in  
tail, and  
husbands  
and wives.

Coparceners were compellable to make partition by the common law. And hence, if an equal partition is made by an infant, or by a tenant in tail, or by husband and wife seised in right of the wife, even by an ordinary assurance, it is binding on the infant, the issue in tail, and the wife and her heirs; though, if unequal it is voidable. But still, in order to prevent the question of the equality of the partition from arising, it is better, in the case of a partition by a tenant in tail or by husband and wife, to have recourse to the statutory mode of barring the issue in tail and the wife (*b*). Joint tenants and tenants in common were not compellable to make partition by the common law. And hence, if even an equal partition is made by an infant or tenant in tail, or husband and wife seised in her right, holding in joint tenancy, the deed of partition is governed by the same rules as conveyances or other acts done by them. So that, in order to bind the issue in tail and the wife and her heirs an enrolled and acknowledged assurance under the Fines and Recoveries Abolition Act is necessary (*c*). For the same reasons, a coparcener and her husband may grant a rent in fee for equality of partition out of her part, if the partition will then be equal; but a joint tenant and her husband cannot grant such a rent (*d*). 1973.

Partition  
under stat.

[By virtue of stat. 45 & 46 Vict. c. 38, s. 3 (iv.)

(*a*) See 6 Jarm. & Byth. by Sweet,  
602; Co. Litt. 169 a, b.

(*b*) See 6 Jarm. & Byth. by Sweet,  
590, 591.

(*c*) See 6 Jarm. & Byth. by Sweet,  
591.

(*d*) 6 Jarm. & Byth. by Sweet,  
591.

(Appendix), a tenant for life, and the limited owners, including a tenant in tail, mentioned in section 58, are empowered to make partition of settled land, including a partition in consideration of money paid for equality of partition.] 1973<sup>a</sup>.

Pr. III. T. 12,  
Ch. 2, s. 7.

45 & 46 Vict.  
c. 38. The  
Settled Land  
Act, 1882.

There was a condition annexed to every partition between coparceners, that, if either the whole, or any share, or an estate for life or in tail thereout, were evicted, the coparcener so evicted, if he or she had not aliened his or her whole estate, might enter on the part or parts allotted to the other or others, and avoid the partition against the other or others, or his, her, or their alienee or alienees. But if a coparcener had aliened his or her whole estate, neither he nor she nor his nor her alienee had any such right of entry, because the privity between the coparceners was wholly destroyed (*a*). And no such condition existed in the case of joint tenants or tenants in common (*b*). The reason of the condition in the case of coparceners would seem to be, that, as they were compellable to make partition by the common law, that law took care that they should not be prejudiced thereby. However, it is enacted by the stat. 8 & 9 Vict. c. 106, s. 4, that "a partition of any tenements or hereditaments made by deed executed after the 1st October, 1845, shall not imply any condition in law." 1974.

Implied  
condition.

It was enacted by the stat. 7 & 8 Vict. c. 76, s. 3, "that no partition of any freehold or leasehold land shall be valid at law, unless the same shall be made by deed." And although this Act was repealed by the stat. 8 & 9 Vict. c. 106, yet, by s. 3 of that statute, it is enacted, that "a partition of any tenements or hereditaments, not being copyhold, made after the 1st October, 1845, shall be void at law, unless made by deed." 1975.

Deed  
required.

(*a*) 2 Cruise T. 19, § 30; Burton, § 319; Co. Litt. 173 b, 174 a, b.

(*b*) 4 Cruise T. 32, c. 6, § 16.

## SECTION VIII.

*Of a Release and of an Acquittance.*

Pr. III. T. 12,  
Ch. 2, s. 8.

Definition of  
a release.

A release is a deed by which a right is extinguished, or by which an estate or interest in things real or personal is conveyed to a person who has already some estate or interest in possession in the same (a). 1976.

Definition of  
an acquit-  
tance.

An acquittance is a discharge in writing of a sum of money or other duty which ought to be paid or done: as, if one is bound to pay money on an obligation or rent reserved upon a lease, and the person to whom the money or the rent ought to be paid or rendered, upon the receipt thereof or upon some other agreement between them, makes a writing under his hand, witnessing that he is paid or otherwise satisfied, and therefore acquits and discharges the former of the same (b). 1977.

*I. The Different Kinds of Releases and their Operation.*

Ways in  
which  
releases may  
enure.

Releases may enure in four ways: 1. By way of mitter l'estate. 2. By way of mitter le droit. 3. By way of extinguishment. 4. By way of creation or enlargement of an estate (c). 1978.

Release by  
way of  
mitter  
l'estate.

When two or more persons become seised of the same estate by a joint title, either by contract or descent, as joint tenants or coparceners, and one of them releases his right to the other, such release is said to enure by way of mitter l'estate, *i.e.*, passing an estate (d). In releases that enure by way of mitter l'estate, a fee will pass by such a release without any words of limitation, where the parties were seised in fee by a joint title; because

(a) See 2 Pres. Shep. T. 320, and different kinds of releases, *infra*, par. 1978—1982.

(b) 2 Pres. Shep. T. 347.

(c) Co. Litt. 193 b, and 267 a,

n. (1); 2 Bl. Com. 324—5.

(d) 4 Cruise T. 32, c. 6, § 22; Burton, § 50; 2 Pres. Shep. T. 327; Co. Litt. 267 a, n. (1); Watk. Conv. 3rd ed. by Prest. 183.

the release, by discharging the claims of one of them, Pr. III. T. 12, CH. 2, s. 8. causes the releasee to have the whole in fee (a). 1979.

Releases are said to enure by way of mitter le droit, *i.e.*, Releases by way of mitter le droit. transferring the right, where a person who has been disseised releases to the disseisor or to his heir or feoffee (b). If a release of right is made for one day or one hour, and the right has once gone by such release, without any condition, etc., it is gone for ever (c). Hence, this kind of release is good without any words of limitation, whether the releasee has a particular estate or the fee simple, and whether he has a freehold in possession or only in remainder or reversion; but he must have an estate of freehold in possession, remainder, or reversion (d). 1980.

A release enures by way of extinguishment, where it Release by way of extinguishment. operates to take a right from the releasor, but the right is such that it cannot be vested in the releasee, and can only be extinguished in his favour. Thus, if a lord releases his seigniorship to the tenant, or if a person having a rent or common releases it to the terre-tenant, these releases are said to operate by way of extinguishment; because the tenant cannot have services or rent to receive of himself, nor can he take common in his own land (e). A release to one of two joint tenants or coparceners by way of extinguishment enures to the benefit of both; but it is otherwise when it operates by way of conveyance (f). 1981.

Releases enure by way of enlargement of estate, when Releases by way of enlargement. he who has a remainder or reversion in fee releases all

(a) 4 Cruise T. 32, c. 6, § 24; 2 Pres. Shep. T. 327, 346; Co. Litt. 273 b.

(b) 4 Cruise T. 32, c. 6, § 26; Co. Litt. 267 a, n. (1), 274 a, n. (1); Watk. Conv. 3rd ed. by Prest. 183.

(c) 9 Jarm. & Byth. by Sweet, 810; Co. Litt. 274 a.

(d) 2 Pres. Shep. T. 331; 4 Cruise T. 32, c. 6, § 24, 27; Co. Litt. 274 a.

(e) 4 Cruise T. 32, c. 6, § 35; Co. Litt. 267 a, n. (1), 280 a; Litt. s. 479, 480; Watk. Conv. 3rd ed. by Prest. 183.

(f) 2 Pres. Shep. T. 308; Watk. Conv. 3rd ed. by Prest. 162, 163.

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his right and interest in the lands to the person who has a prior particular estate, whether in possession or remainder (*a*). 1982.

To render this kind of release good, it is necessary that there should be a privity of estate between the releasor and the releasee, and also that the releasee should have a vested interest in the lands intended to be released (*b*). 1983.

With respect to privity, if a lessee for years in possession makes an underlease, and the reversioner releases to the lessee for years, this is a good release to enlarge the estate; because the immediate privity still continues between them. But as there is no privity between the underlessee and the reversioner in fee, the underlessee's estate cannot be enlarged by a grant to him by the reversioner in fee (*c*). If a lessee for years, instead of making an underlease, assigns over all the term, the privity is gone, and a release made to him afterwards is void; but a release made to the assignee of the term is good, to enlarge the estate (*d*). 1984.

In order to take a release, operating by enlargement, from a lessor, a lessee for years, under a common law demise, must have entered on the lands before the execution of the release; for, till entry, he has only an *interesse termini*, which is not capable of being enlarged (*e*). 1985.

A release to a person having an estate by statute merchant, statute staple, or *elegit*, or to a tenant at will, or to a tenant in dower or by the curtesy, operates to enlarge his or her estate (*f*). 1986.

(*a*) 4 Cruise T. 32, c. 6, § 28; Co. Litt. 270 a, n. (3), 273 a; Watk. Conv. 3rd ed. by Prest. 182—4.

(*b*) Co. Litt. 270 a, n. (3), 272 b, n. (1); 4 Cruise T. 32, c. 6, § 28; Burton, § 53; Watk. Conv. 3rd ed. by Prest. 182, 184.

(*c*) 2 Pres. Shep. T. 324, 326;

Co. Litt. 273 a.

(*d*) 2 Pres. Shep. T. 326.

(*e*) 4 Cruise T. 32, c. 6, § 29; Co. Litt. 270 a, n. (2); Watk. Conv. 3rd ed. by Prest. 20.

(*f*) 4 Cruise T. 32, c. 6, § 31; Co. Litt. 270 b, 1, 272 b, 1; Watk. Conv. 3rd ed. by Prest. 5.



It seems to be a general rule, that whenever an estate may merge in the remainder or reversion, that estate may be enlarged by the release of the remainderman or reversioner (*a*). 1987.

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Ch. 2, s. 8.

A release to operate by way of enlargement may be made to a vested remainderman for life even before entry, because he has an estate of freehold in law (*b*). But if a man is disseised and has only a right, or if he has a possession only and no estate, or if he has neither estate nor possession, a release made to such a one will not avail to enlarge his estate (*c*). 1988.

If a tenant for life leases for years, and the reversioner and the tenant for life join in a release to the lessee for years, this is a good release to enlarge the estate; operating first as the release of the estate for life, and secondly as an enlargement of the estate for life into a fee simple (*d*). 1989.

The particular tenant cannot release to the reversioner, but his estate must be extinguished by surrender or merger. On the other hand, the estate of the reversioner cannot be merged in the particular estate or be surrendered to the tenant of that estate; but it may be released to him by way of enlargement, so as to produce a merger of the particular estate (*e*). 1990.

The operative words in a release enuring by way of transferring a right or of extinguishment, are "remit, release, and for ever quit claim and discharge." The operative words of a release in enlargement, by trustees, are "bargain, sell, and release:" those in a similar release by owners, are, "grant, bargain, sell, release, and confirm." But any expression of an intention to release will suffice (*f*). 1991.

Operative  
words.

(*a*) 2 Pres. Shep. T. 324.

(*b*) 2 Pres. Shep. T. 325.

(*c*) 2 Pres. Shep. T. 325.

(*d*) 2 Pres. Shep. T. 326.

(*e*) 2 Pres. Shep. T. 324.

(*f*) Watk. Conv. 3rd ed. by Prest. 186; Co. Litt. 264 b; 2 Bl. Com. 324; 2 Pres. Shep. T. 320, 327; 4 Cruise T. 32, c. 6, § 20.

Pr. III. T. 12,  
Ch. 2, s. 8.

Release in  
law.

Besides express releases, which are sometimes called releases in deed, there are also releases in law (a). 1992.

A covenant never to sue amounts in construction of law to an absolute release of the covenantee. But a covenant not to sue for a definite period or during a given state of circumstances, is no release (b). 1993.

General  
words  
restrained  
by recital.

The general words of a release may be restrained by the recitals (c). And therefore, in preparing releases which are intended to be general, care should be taken to avoid any recitals which by possibility might have the effect of narrowing the operation of the instrument (d). 1994.

Release to  
one of  
several co-  
debtors or  
joint cove-  
nantors.

A release, whether in deed or by operation of law, to one of several co-debtors, discharges all of them, as well in equity as at law, though they are severally as well as jointly bound; and a proviso that the co-debtor shall not take advantage of the release would be repugnant and void (e). 1995.

So in equity, whatever act is a discharge of the principal will be a discharge of the surety, though the surety be not released at law (f). 1996.

And the like rule applies to joint and several covenants (g). But this rule is confined to a release properly and technically so called; for a perpetual covenant not to sue, which operates as an absolute release of the covenantee, will not discharge a co-debtor, though the debt of the covenantee and the third person is joint only, and not joint and several (h). 1997.

Joint release  
to those  
against  
whom there

If one has several causes of action against two, and makes a joint release to them, this shall be taken to be

(a) Co. Litt. 264 b.

(b) 9 Jarm. & Byth. by Sweet,  
797; *Ray v. Jones*, 19 C. B. (N. S.)  
416.

(c) 9 Jarm. & Byth. by Sweet,  
817.

(d) 9 Jarm. & Byth. by Sweet,  
884 (b).

(e) 9 Jarm. & Byth. by Sweet,  
811; 1 Pres. Shep. T. 71; 2 Id.  
337.

(f) 1 Pres. Shep. T. 71; *Webb v.*  
*Hewitt*, 3 K. & J. 488.

(g) 2 Pres. Shep. T. 337.

(h) 9 Jarm. & Byth. by Sweet,  
811, 812; 2 Pres. Shep. T. 253.

a release of all joint and several causes of action (a). Pr. III. T. 12, Ch. 2, s. 8.  
1998.

A release of breaches of trust to one trustee, will generally enure to the benefit of his co-trustee (b). 1999.

are several causes of action.

Release to one trustee.

A release of the right to land, if made to a tenant in tail or for life, will avail and enure to a person who has a reversion or remainder. And so, e converso, a release of right made to a person who has a remainder or reversion will avail and enure to the benefit of a person who has a prior estate in tail, or for life, or for years (c). Indeed, such a release will operate for the benefit of all persons who are entitled to the property by the same means (d). 2000.

Release of right to the owner of a particular estate, or to a remainderman or reversioner.

If a tenant in tail makes a lease for years, and afterwards releases all his right to the lessee for years in possession, to hold to him and his heirs for ever, this will pass a determinable fee, subject to be avoided by the issue, until they are barred (e). 2001.

Release by tenant in tail.

A right of action cannot be released for a time only, but if once released, it will be so for ever. And therefore, if a release of right is made to any one who has an estate of inheritance by wrong, or a particular estate of freehold, though but for one hour, this is a good release for ever. But it is otherwise with a release operating by way of enlargement. Thus, if a lessor releases to his lessee for years all his right which he has in the land, without using any other words in the deed, or releases to him for his life, he has an estate for his life only by way of enlargement of estate (f). 2002.

What releases may be for a time only.

But a release by enlargement may be for life.

We have seen that prior to the stat. 22 & 23 Vict. c. 35, s. 10, a release of any part of the lands operated as

Release of part of land which is

(a) 2 Pres. Shep. T. 344.

(b) 9 Jarm. & Byth. by Sweet, 812.

(c) 2 Pres. Shep. T. 335; Co. Litt. 267 b; Watk. Conv. 3rd ed. by Prest. 42, 114.

(d) Burton, § 49; Watk. Conv. 3rd ed. by Prest. 42.

(e) 2 Pres. Shep. T. 347.

(f) 2 Pres. Shep. T. 345—6; Watk. Conv. 3rd ed. by Prest. 42, 115.

Pr. III. T. 12,  
Ch. 2, s. 8.

subject to a  
rent charge.

Third  
person not  
entitled to  
benefit of  
release.

a release of a rent-charge issuing out of the whole (a).  
**2003.**

In general, a release made between certain parties cannot be set up against the claims of the releasor by a third person who is no party, though it professes to discharge him from those claims (b). **2004.**

## II. *What may be released (c).*

Covenant to  
do an act.

A covenant to do an act may be released before it is broken, by a release of the covenant eo nomine, or by words to that effect (d). **2005.**

Debts,  
legacies, and  
other duties.

Debts, legacies, and other duties may be released and discharged before or after they should be paid or performed (e). **2006.**

Interesse  
termini.

If a lease for years is made to two, to begin at a day to come, a release by one of them to the other is good. And a person who has an interesse termini may release it to the lessor (f). **2007.**

Condition.

If a person grants an estate on condition, he may, before condition broken, release all his right in the land, or release the condition to the grantee; and this will make the estate absolute (g). **2008.**

Tenures,  
services,  
rents,  
commons,  
and other  
profits.

Tenures, services, rents, commons, and other profits arising out of or annexed to lands may be extinguished by release to the owner of the land (h). **2009.**

Hope of  
succession,  
possibility,  
or executory  
interest.

Except so far as the stats. 7 & 8 Vict. c. 76, s. 5, and 8 & 9 Vict. c. 106, s. 6 (i), may apply, the mere hope of an heir apparent, or a mere possibility, or an executory interest, where the person is unascertained, cannot be released (j).

(a) See supra, par. 66.

(b) 9 Jarm. & Byth. by Sweet, 809

(c) As to the release of a right of execution under a judgment or statute, see supra, par. 1231 et seq.

(d) 2 Pres. Shep. T. 322.

(e) 2 Pres. Shep. T. 323, 333.

(f) 2 Pres. Shep. T. 327.

(g) 2 Pres. Shep. T. 332.

(h) 2 Pres. Shep. T. 322, 332; 4 Cruise T. 32, c. 6, § 38; Watk. Conv. 3rd ed. by Prest. 158.

(i) See infra, Ch. 6, s. 4, No. V.

(j) 2 Pres. Shep. T. 322, 328; Burton, § 47, 48; Co. Litt. 265 a, b.

And though executory interests in real estate in a person who is ascertained may be released, yet they are only releaseable to the terre-tenant or owner of the land, and not to a stranger (a). **2010.**

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Ch. 2, s. 8.

A mere authority or a power without any interest cannot be released. And therefore, if a person devises that his executors shall sell his land, and the executors release all their right and title in the land to the heir, this is void. But a power coupled with an interest may be released (b). **2011.**

Power.

Although rights and titles of entry could not be granted by act of the party (c), nor could any action be granted by act of law or of the party, yet these may, and always might be released to the terre-tenant, and his heirs, in respect of realty, or his executors and administrators, in respect of chattel interests (d). They may be released to any person who has a vested estate in the tenement, whether in possession, reversion, or remainder, with this qualification only, that the right to an estate of freehold can only be released to a person whose estate is of that degree either by right or by wrong (e). **2012.**

Rights and  
titles of  
entry or  
action.

A man may release a sum of money owing to his wife, while sole; and one of several partners in trade may release a debt owing to the firm; the power of release being incidental to the power to receive, which is possessed by the husband and partner (f). **2013.**

Money  
owing to a  
wife or  
partner.

If two have the grant of the next advowson or avoidance of a church, one of them may release to the other, before it is void, but not afterwards (g). **2014.**

Next pre-  
sentation.

(a) 2 Pres. Abstracts, 284; see *infra*, T. 12, Ch. 6, s. 4, No. V.

(b) 2 Pres. Shep. T. 328, 332; 4 Cruise T. 32, c. 6, § 39; Co. Litt. 265 b; *Smith v. Houblon*, 26 Beav. 482.

(c) See *infra*, Ch. 6, s. 4, No. V.

(d) 2 Pres. Shep. T. 321; 4 Cruise

T. 32, c. 6, § 38, 39; Co. Litt. 265 a, n. (1).

(e) Burton, § 46; Co. Litt. 265 a, 1, 265 b, 266 a; Litt. s. 449—451.

(f) 9 Jarm. & Byth. by Sweet, 802.

(g) 2 Pres. Shep. T. 332.

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Obligation  
or cause of  
action.

One of several joint obligees may release the obligation. So, generally, one of several co-plaintiffs may release the cause of action, though the plaintiffs be trustees ; but if this power is exercised fraudulently, the Court will set aside the release (a). 2015.

### III. *Construction of Releases.*

Release of  
rent,

as distin-  
guished  
from a  
grant.

Release of  
covenants.

Release of  
promises or  
assumpsits.

Release of  
debts.

Release of  
quarrels,  
controversies,  
or  
debates.

Release of  
actions.

By a release of rent, the rent is extinct and discharged, whether the day of payment be come or not (b). And a release of rent to a reversioner or remainderman will entitle the owner of a particular estate to the benefit of the release, and e converso. But a grant to the tenant, reversioner, or remainderman, cannot be taken advantage of by any other person than the grantee (c). 2016.

By a release of all covenants, all covenants then in being, which are then broken, or may afterwards be broken, are discharged (d). 2017.

By a release of all promises or assumpsits, a man may bar himself of the fruit or effect of the promises, or damages for the breach of them, when they could not be released by other words (e). 2018.

By a release of all debts, are discharged all debts then owing from the releasee to the releasor (f). 2019.

By a release of all quarrels, or all controversies, or all debates, all actions real and personal and all causes of such actions are discharged, except causes of suit that were not existing at the time of the release, as the future breach of a covenant, whether existing at the time of the release or afterwards entered into (g). 2020.

A release of all actions will not discharge executions, or bar a man of taking out execution, except it be where it

(a) 9 Jarm. & Byth. by Sweet, 803.

(b) 2 Pres. Shep. T. 343.

(c) Watk. Conv. 3rd ed. by  
Prest. 158.

(d) 2 Pres. Shep. T. 342.

(e) 2 Pres. Shep. T. 343.

(f) 2 Pres. Shep. T. 341.

(g) 2 Pres. Shep. T. 342.

must be done by scire facias ; neither will it discharge or Pr. III. T. 12.  
Ch. 2, s. 5.  
bar a man of suits by auditâ querelâ, unless depending, or  
by writ of error to reverse an erroneous judgment ; neither  
will it discharge covenants before they are broken ; nor  
will it discharge anything for which the releasor had not  
cause of action at the time of the release made (a). A  
release to A. & B. of all actions which the releasor has  
against them, extends to actions against the releasees  
severally as well as jointly ; for it shall be taken most  
beneficially for him to whom the release is made, and  
most strongly against him who makes it (b). **2021.**

The word "suits" is of a somewhat more large extent Release of  
suits.  
than "actions ;" for, by a release of all suits, are dis-  
charged, not only all actions, but also all executions, in the  
case of a subject (c). **2022.**

By a release of all a man's right in any lands or tene- Release of  
right.  
ments, all manner of rights of action and entry of the  
releasor in or against the land, are discharged. But this  
release of right will not bar a man of a possibility of a  
right that he has at the time of the release, or of a right  
that shall descend to him afterwards. And therefore, if  
the conusee of a statute before execution releases all his  
right in the land to the terre-tenant, or the heir of a  
disseisee in the lifetime of his father releases to the  
disseisor all his right, these releases do not bar them (d).  
**2023.**

A release of title has the same operation as a release of Release of  
title.  
all right (e). **2024.**

A release of all demands is the best release of all. By Release of  
demands or  
claims.  
a release of all demands, are released all right and titles  
to land, warranties and conditions annexed to estates,  
whether broken or not, all statutes, obligations, contracts,

(a) 2 Pres. Shep. T. 338.

(d) 2 Pres. Shep. T. 339 ; Litt.

(b) 9 Jarm. & Byth. by Sweet, s. 446 ; Co. Litt. 265 b.  
810, 811.

(e) 2 Pres. Shep. T. 340.

(c) 2 Pres. Shep. T. 342.

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recognisances, covenants, rents, commons, and the like; and all manner of actions, real and personal, appeals, debts, and duties; and all manner of judgments and executions; and all annuities and arrears of annuities and rents. And if a man has a rent service, rent charge, estovers, or other profit to be taken out of the land, by such a release to the tenant of the land it is discharged and extinct. And a release of all claims is much of the same nature (a). But a release of all demands or all claims has not the effect of releasing anything which cannot be specifically released; as a mere possibility not coupled with any present interest, or the like (b). And a release of all demands is in general confined to demands existing at the time of the release; and therefore does not extend to a covenant not then in being or then unbroken; nor to a legacy payable at a future day (c). **2025.**

A receipt in full discharge of all claims, means of all claims which were known to the person giving the receipt (d). **2026.**

Release of  
the prin-  
cipal.

In a release of the principal, the accessory is included. And therefore a release of all debts or duties will operate as a discharge of all actions, judgments, executions, and obligations. By releasing a debt, the security for the debt is released. And a release of judgments will extend to an execution (e). **2027.**

Release of  
debts or  
duties.

Release of  
judgments.

#### IV. Releases Generally.

Seal.

A release must be under seal (f). **2028.**

Release  
upon condi-  
tion or on

A release by way of mitter l'estate may be made upon condition, either precedent or subsequent. And a release

(a) 2 Pres. Shep. T. 343—4.

(b) 2 Pres. Shep. T. 344.

(c) 9 Jarm. & Byth. by Sweet,  
815, 816.

(d) *Earrs v. Hickson*, 30 Beav.  
142.

(e) 9 Jarm. & Byth. by Sweet, 814.

(f) 9 Jarm. & Byth. by Sweet, 801.



by way of mitter le droit or extinguishment may be made upon a condition precedent; but it cannot be made subject to a condition subsequent. If such a thing is attempted, the release is good, and the condition subsequent is void; because a right released for an instant is released for ever (a). **2029.**

Pr. III. T.12,  
Ch. 2, s. 8.

a future  
time or  
event.

But a release of debts may be made subject to a condition subsequent; so that a release by creditors in a composition deed may be subject to a proviso, that if the composition be not paid, the deed shall become void (b). **2030.**

A release of all actions may be made upon a time past as until the 1st of May last, or until the day of the date of the release. But a release cannot be made of a right of action for a part of an estate, nor, as we have seen, for a time only to come: as for one year, or until a future time. And yet a man may release his right in a part of the land (c). **2031.**

Partial  
releases.

If a man is under covenant to perform two things, the covenantee may discharge one of them; but an entire thing cannot be released in part (d). **2032.**

A debt may be released even before the day of payment, by apt words (e). **2033.**

Release of a  
debt.

A release is an act favoured and strenuously supported by the law, as it induces peace and promotes good order (f). **2034.**

Releases  
favoured.

But releases will be set aside by a Court of Equity, where they have been extorted by fraud, or extended to matters not contemplated by the releasor, or have been obtained from persons who at the time were not conscious of their rights (g). And although a release is general in

Relief  
against  
releases.

(a) 2 Pres. Shep. T. 307, 323.

(e) See 2 Pres. Shep. T. 334.

(b) *Newington v. Levy*, L. R. 6 C. P. (Ex. Ch.) 180.

(f) 2 Pres. Shep. T. 244.

(c) 2 Pres. Shep. T. 323.

(g) 9 Jarm. & Byth. by Sweet, 805; Story's Eq. Jur. § 145; *Eyre v. Burmester*, 10 H. L. Cas. 90.

(d) 9 Jarm. & Byth. by Sweet, 814.

**PT. III. T. 12,**  
**CH. 2, s. 8.** its terms, the Court will limit its operation to matters contemplated by the parties at the time of its execution (a). And the Court will not permit a release to stand which has been obtained without a full and honest disclosure to the releasor of all the circumstances in the releasee's knowledge affecting his (the releasor's) actual situation. But, unless such a disclosure has been withheld, the Court will not disturb an arrangement intended as a compromise of doubtful rights, especially between the members of a family, because the parties entertained mistaken notions of those rights (b). **2035.**

## SECTION IX.

### *Of a Confirmation.*

**PT. III. T. 12,**  
**CH. 2, s. 9.** A confirmation is a deed whereby a conditional or void-  
**Definition.** able estate is made absolute and unavoidable by the con-  
firmor, so far as he is able, or whereby a particular estate  
is increased (c). **2036.**

**Operative**  
**words.** The usual operative words of a confirmation are "give,  
grant, ratify, approve, and confirm" (d). But a confirma-  
tion may be made by other words. **2037.**

**Estate or**  
**possession**  
**to work**  
**upon.** There must be a precedent rightful or wrongful estate  
in the person to whom the confirmation is made, in his  
own or in another's right, or, at least, he must have the  
possession of the thing whereof the confirmation is made,  
as a foundation for the confirmation to work upon (e).  
A person who has only an *interesse termini* cannot receive  
a confirmation until he has entered (f). **2038.**

(a) *Lyall v. Edwards*, 6 Hurl.  
& Norm. 337.

(b) 9 Jarm. & Byth. by Sweet,  
806.

(c) Co. Litt. 295 b ; 2 Bl. Com.  
325 ; Watk. Conv. 3rd ed. by Prest.  
186—7.

(d) Co. Litt. 295 b, 301 b ; 2  
Bl. Com. 325 ; 3 Jarm. & Byth. by  
Sweet, 591 ; 2 Pres. Shep. T. 314 ;  
Watk. Conv. 3rd ed. by Prest. 188.

(e) 2 Pres. Shep. T. 312.

(f) Watk. Conv. 3rd ed. by  
Prest. 20.

To give validity to a confirmation of a voidable estate, the party confirming must not be ignorant of his rights, and must be informed of the consequences in point of law, and must be a free agent (*a*). **2039.**

Pr. III. T. 12,  
CH. 2, s. 9.

Other  
requisites to  
confirmation of void-  
able estates.

To enlarge a particular estate by confirmation, there must be words of limitation (*b*). **2040.**

Where  
words of  
limitation  
are neces-  
sary.

A confirmation sometimes serves to make sure a voidable contract, conveyance, or estate, by adding the right to the possession or defeasible seisin; and sometimes to make a conditional estate absolute, by discharging the condition; and sometimes to enlarge an estate. But it will not make a contract, conveyance, or estate good which is absolutely void: for quod ab initio non valet, in tractu temporis non convalescit. Nor will it add to an estate a descendible quality, nor make a man capable who is incapable of himself (*c*). **2041.**

Operation  
of a confir-  
mation.

A confirmation of the estate of one joint tenant enures to the other joint tenant or tenants; because they have one joint seisin. But it is otherwise in the case of tenants in common; because they have several freeholds and several seisins. But if the confirmation is of the land, to have and to hold the land to one joint tenant, it may enure to him alone (*d*). **2042.**

Confirma-  
tion in the  
case of joint  
tenancy and  
tenancy in  
common.

A confirmation by a disseisee of a particular estate will not enure to the remainder or reversion. But a confirmation by him of a remainder or reversion will operate as a confirmation of the particular estate (*e*). **2043.**

Confirma-  
tion of one  
estate only.

In the case of a lease for years, a confirmation may be made for part of the time. But the proper mode of accomplishing this is, by a confirmation of the land, to

Part of a  
term may be  
confirmed;

(*a*) Sugd. Concise View, 181; *Sacery v. King*, 5 H. L. Cas. 627, 664.

and n. (1).

(*d*) 2 Pres. Shep. T. 319; Co. Litt. 297 b.

(*b*) 2 Pres. Shep. T. 315.

(*c*) 2 Pres. Shep. T. 313, 319; Co.

(*c*) 2 Pres. Shep. T. 311, 315; Story's Eq. Jur. § 306; 4 Cruise T. 32, c. 6, § 47; Co. Litt. 295 b,

Litt. 297 a, 298 a; Watk. Conv. 3rd ed. by Prest. 188.

Pr. III. T. 12,  
CH. 2, s. 9. hold for part of the term, and not of the term or estate (a).  
**2044.**

but not part  
of an estate  
of freehold. A confirmation cannot be made of part of an estate of  
freehold; because an estate of freehold is entire and indi-  
visible (b). **2045.**

Confirma-  
tion of part  
of the land  
or other  
subject. A confirmation may be made of part of the land or other  
subject (c). **2046.**

Confirma-  
tion of a por-  
tion of a  
settlement. As a general rule, a confirmation of a portion of a  
settlement operates as a confirmation of the whole (d).  
**2047.**

Uses or  
trusts. If there is nothing more than a confirmation of title,  
there cannot be any uses or trusts, because no seisin  
passes (e). **2048.**

## SECTION X.

### *Of a Surrender.*

Pr. III. T. 12,  
CH. 2, s. 10. A surrender, sursum redditio, or rendering up, is of a  
nature directly opposed to a release operating by way of  
enlargement. It is a yielding up of an estate for life or  
years to him who has a higher or equal estate in immediate  
reversion or remainder, wherein the particular estate may  
merge or drown (f). **2049.**

Surrenders  
are either  
express or  
implied. A surrender is of two kinds:—1. Express, or in deed,  
that is, by the express agreement of the parties that a  
surrender should be made. 2. Implied, or in law, that is,  
by operation of law (g). **2050.**

(a) See 2 Pres. Shep. T. 317; 3  
Jarm. & Byth. by Sweet, 592; Co.  
Litt. 297 a, and n. (1); Watk. Conv.  
3rd ed. by Prest. 188.

(b) 2 Pres. Shep. T. 317; 3 Jarm.  
& Byth. by Sweet, 591; Co. Litt.  
296 b, 297 a, n. (1); Watk. Conv.  
3rd ed. by Prest. 188.

(c) 2 Pres. Shep. T. 317; Co.  
Litt. 297 a; 3 Jarm. & Byth. by  
Sweet, 521—2; Watk. Conv. 3rd  
ed. by Prest. 188.

(d) *Jarratt v. Aldam*, L. R. 9 Eq.  
463; *Davies v. Davies*, L. R. 9 Eq.  
468.

(e) 3 Jarm. & Byth. by Sweet,  
592.

(f) Co. Litt. 337 b, and n. (1); 2  
Bl. Com. 326; 2 Pres. Shep. T. 300;  
Watk. Conv. 3rd ed. by Prest. 189,  
191.

(g) 2 Pres. Shep. T. 300; Co. Litt.  
338 a; *Phone v. Popplercell*, 12  
C. B. (N. S.) 334.

The usual operative words are—"surrender, and yield up." But any other words that denote that the remainderman or reversioner is to have the particular estate will suffice (*a*). 2051.

PT.III. T.12,  
CH. 2, s. 10.

Operative  
words.

Subject to the following qualifications, a surrender may be made of any kind of estate for life (as by dower, by curtesy, or by tenancy in tail after possibility of issue extinct); or of any estate for years, or for years determinable upon lives, in any kind of property that is grantable (*b*). 2052.

What estates  
may be sur-  
rendered.

In order that a surrender in deed may be good—

1. The surrenderor must have a vested estate. And therefore rights and titles only cannot be surrendered (*c*). Thus if a lessee for life is ousted by a stranger, and afterwards surrenders to his lessor, the surrender is void; because he had but a right at the time of the surrender. So if a woman has a title to dower, and surrenders to the person against whom she ought to have dower, it is void for the same reason. And a lease for years, to commence at a future day cannot be surrendered; nor can a lease for years at common law, before entry; because the lessee has no vested interest, but only an *interesse termini* before the commencement of the lease in the one case, or entry in the other, and the lessor has no reversion before that time (*d*). 2053.

Requisites  
to a surren-  
der in deed.  
1. Vested  
estate.

2. The estate of the surrenderor must be one that may merge in the estate of the surrenderee. And therefore an estate tail cannot be surrendered, even to a person who has the reversion in fee (*e*). 2054. And for the same reason,

2. Capacity  
of merger.

3. The estate of the surrenderor must be of a lower denomination than the estate of the surrenderee, or of the

3. Not of  
higher  
denomina-  
tion.

(*a*) 2 Bl. Com. 326; 2 Pres. Shep. T. 306; 4 Cruise T. 32, c. 7, § 4; Watk. Conv. 3rd ed. by Prest. 23, 192. Litt. 338 a; Watk. Conv. 3rd ed. by Prest. 114.

(*d*) 4 Cruise T. 32, c. 7, § 10; Watk. Conv. 3rd ed. by Prest. 20.

(*b*) 2 Pres. Shep. T. 303, 306.

(*e*) 2 Pres. Shep. T. 306; Burton,

(*c*) 2 Pres. Shep. T. 306; Co. § 751.

Pr. III. T. 12,  
Ch. 2, s. 10.

same, and not of a higher denomination. And therefore an estate in fee simple cannot be surrendered; nor can an estate for life be surrendered to a person who has only an estate for years. But a tenant for his own life may surrender to another person who has only an estate for his own life. And a term for years may be surrendered even to a person who has a term for a fewer number of years than the surrenderor (*a*). 2055. For the same reason,

4. Next  
estate in  
remainder  
or rever-  
sion.

4. The estate of the surrenderee must be the next estate in remainder or reversion, so that there be no intervening estate to prevent a merger (*b*). Thus, if a lease is made for years, remainder for life, remainder in fee, the lessee for years may surrender to the lessee for life; and so may the tenant for life to the person in remainder or reversion in fee. But if a lease is made for life, remainder for life, remainder in fee, the first tenant for life cannot surrender to the person in remainder in fee, on account of the intermediate estate (*c*). 2056.

5. Privity.

5. There must be a privity of estate between the surrenderor and the surrenderee. Hence, if a lessee for twenty years make a lease for five years, and the lessee for five years enters, and afterwards the lessee for twenty years surrenders to the person in reversion or remainder, this is a good surrender. So also if the two lessees join in the surrender, it is good; for, by construction of law, there is first, a surrender by the tenant for twenty years to the reversioner, and secondly, a surrender by the termor for five years to the same person. So also if the first lessee surrenders first, and the lessee for five years surrenders afterwards, the surrender is good. But if the lessee for five years attempts to surrender to the person in reversion or remainder before the lessee for twenty years surrenders, this act cannot take effect as a surrender, for two reasons;

(*a*) 2 Bl. Com. 326; 2 Pres. Shep. T. 303, 306; Watk. Conv. 3rd ed. by Prést. 25, 36, 190.

(*b*) 2 Pres. Shep. T. 303; Co. Litt. 337 b, n. (1).

(*c*) 2 Pres. Shep. T. 304.

first, because there is a remnant of the term as an inter-  
 venient estate to hinder the drowning of the term; and,  
 secondly, because while the interposed reversion continues,  
 there wants a privity between the lessee for five years and  
 the remainderman or reversioner (*a*). 2057.

Pr.III. T.12  
 Ch. 2, s. 10.

6. The surrender must not be of part of an estate. Thus,  
 if a person has a lease for ten years, he cannot surrender  
 the last seven years, and keep to himself the first three  
 years (*b*). 2058.

6. Not of  
 part of an  
 estate.

7. By the Statute of Frauds, 29 Car. 2, c. 3, s. 3, no  
 surrender is valid unless it is by deed or note in writing  
 duly signed, or by act or operation of law (*c*). So that  
 a term for years or for life cannot be extinguished by  
 cancelling the instrument of demise, or otherwise than  
 either by a writing or accepting another lease incom-  
 patible with the former lease (*d*). And such things as  
 commons, rents, advowsons, reversions, remainders, and  
 other incorporeal hereditaments that cannot be granted  
 without deed, could not be surrendered without deed (*e*).  
 But an estate of freehold of lands in possession might  
 be surrendered to the immediate reversioner or remain-  
 derman, by deed or note in writing, without livery of  
 seisin or anything tantamount to it (*f*). And it was  
 enacted, by the stat. 7 & 8 Vict. c. 76, s. 4, "that no  
 surrender in writing of any freehold or leasehold land  
 shall be valid as a surrender, unless the same should  
 be made by deed; but any agreement in writing to  
 surrender any such land shall be valid and take effect  
 as an agreement to execute a surrender." This was  
 repealed by the stat. 8 & 9 Vict. c. 106; but by s. 3 of

7. Deed or  
 note in  
 writing.

(*a*) 2 Pres. Shep. T. 303, 305; 4  
 Cruise T. 32, c. 7, § 11.

(*b*) 2 Pres. Shep. T. 306.

(*c*) See supra, par. 1695, 1696;  
 4 Cruise T. 32, c. 7, § 6; Burton,  
 § 751; Watk. Conv. 3rd ed. by  
 Prest. 192.

(*d*) 2 Pres. Shep. T. 306; Co. Litt.  
 338 a, n. (1).

(*e*) 2 Pres. Shep. T. 307; Co. Litt.  
 338 a.

(*f*) 3 Jarm. & Byth. by Sweet,  
 259; Co. Litt. 337 b, n. (1), 338 a;  
 Burton, § 751.

PT. III. T. 12,  
CH. 2, s. 10.

that statute, "a surrender in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing, made after the 1st October, 1845, shall be void at law, unless made by deed." 2059.

Surrender  
on condi-  
tion.

A surrender may be made upon a condition precedent or subsequent (a). 2060.

Surrender of  
an interesse  
termini.

An interesse termini cannot be surrendered in deed; but it will be surrendered in law by accepting a lease for an estate which is incompatible with it (b). 2061.

Surrender  
to one of  
two or more  
joint  
tenants.

A surrender to one of two or more joint tenants will be construed to enure to both or all. But if a tenant for life or years grants his estate to one joint tenant in reversion, this will not enure as a surrender to the other or others, but as a grant to him alone (c). 2062.

Surrenders  
implied, or  
in law.

If a lessee for life accepts another valid lease in writing from the lessor, though it be only for years, it will be a surrender in law of the lease for life (d). Where an estate incompatible with an existing prior estate is accepted, or where the particular estate is actually transferred to the person having the immediate reversion or remainder, with a view that it should abide in him, the law construes it to be a surrender (e). The term "surrender in law" applies to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate continued to exist. Such a surrender is the act of the law, and will take place independently of, and even contrary to, the intention of the parties (f). 2063.

(a) 2 Pres. Shep. T. 307.

(b) Watk. Conv. 3rd ed. by Prest. 20.

(c) 2 Pres. Shep. T. 308; Co. Litt. 183 a, n. (2). 192 a.

(d) 3 Jarm. & Byth. by Sweet, 259, n. (a).

(e) 2 Pres. Shep. T. 300; Watk. Conv. 3rd ed. by Prest. 189.

(f) *Lyon v. Reed*, 13 M. & W. 285.



## SECTION XI.

*Of an Assignment (a).*

An assignment is that kind of total alienation by deed or writing, other than testamentary, of a chattel interest in real property, which is not essentially destructive of such interest, or an alienation by deed or writing other than testamentary, of chattels personal or of an equitable interest in real estate. **2064.**

PR. III. T. 12,  
CH. 2, s. 11.  
Definition.

Some assignments are called gifts; others, bills of sale (b). A gratuitous transfer of personal chattels is specifically called a gift. And a transfer of personal chattels for valuable consideration is termed a bill of sale, whether the transaction be a purchase or a mortgage (c). Also an agreement to sell and purchase, not referring to any instrument to be afterwards executed in order to transfer the property, and amounting to a transfer of the property in *præsenti*, is a bill of sale (d). **2065.**

Gifts and  
bills of sale.

[As to what bills of sale are subject to stat. 41 & 42 Vict. c. 31, see sections 4, 5, and 6 of that Act in the Appendix; and with reference to the bills of sale subject to stat. 45 & 46 Vict. c. 43, and the form of such bills of sale, see sections 3 and 9 of the last-mentioned statute, and also the schedule to that Act in the Appendix (e).] **2065a.**

The technical operative words of an assignment are “assign, transfer, and set over.” But the words “give, grant, bargain, and sell,” or any other words which show the intent of the parties to make a complete transfer, will amount to an assignment (f). **2066.**

Operative  
words.

An assignment of a term differs from a lease or under-

Assign-  
ments of

(a) As to assignments of debts and other choses in action, see stat. 36 & 37 Vict. c. 66, s. 24 (6), at par. 2077a, and *National Provincial Bank v. Harle*, L. R. 6 Q. B. D. 626.

(b) Burton, § 889.

(c) 2 Bl. Com. 440; 2 Steph.

Com. 43, 45.

(d) *Brantom v. Griffiths*, L. R. 2 C. P. D. (Ap.) 212.

(e) See also *Davis v. Burton*, L. R. 10 Q. B. D. 414; 11 Q. B. D. (Ap.) 537.

(f) 4 Cruise T. 32, c. 7, § 17; Watk. Conv. 3rd ed. by Prest. 22, 195.

Pr. III. T. 12,  
Ch. 2, s. 11.

terms dis-  
tinguished  
from leases  
and under-  
leases.

Assignment  
of chattels  
personal.

Mode of  
transfer.

Requisites  
to an assign-  
ment of real  
estate and  
chattels  
real.

What  
amounts to  
an assign-  
ment of  
chattels  
personal.

lease in this circumstance, that, by a lease or underlease, the lessor conveys an interest less than his own, reserving to himself a reversion; whereas in an assignment, the assignor parts with his whole interest in the thing assigned, and puts the assignee in his place (a). 2067.

Chattels personal may in general be given or granted without deed (b). But a registered ship or shares therein can only be transferred by bill of sale, in a prescribed form under seal, executed in the presence of and attested by at least one witness and registered. The name of the transferee, as owner, must be registered, and the date and hour of the entry must be indorsed on the bill of sale (c). And it is enacted by the 3rd section of the Statute of Frauds, that all assignments of leases or terms for years shall be by deed or note in writing, signed by the party assigning or his agent thereunto lawfully authorised by writing. And by the 9th section of the Statute of Frauds, it is enacted, "that all grants and assignments of any trust shall be in writing, signed by the party granting or assigning the same, or else shall be utterly void and of none effect" (d). And it was enacted by the stat. 7 & 8 Vict. c. 73, s. 3, that no assignment of any freehold or leasehold land should be valid at law unless the same should be made by deed. This was repealed by the stat. 8 & 9 Vict. c. 106; but by s. 3 of that statute, "an assignment of a chattel interest, not being copyhold, in any lands or tenements, made after the 1st October, 1845, shall be void at law, unless made by deed." 2068.

Anything written, said, or done, in pursuance of an agreement, and for a valuable consideration, or in consideration of an antecedent debt, to place a chose in action or

(a) 4 Cruise T. 32, c. 7, § 14 :  
Bl. Com. 326; Watk. Conv. 3rd ed.  
by Prest. 22, 192, 194.

(b) 2 Pres. Shep. T. 231 ; 2 Bl.  
Com. 441; Burton, § 889.

(c) Sm. Merc. Law, 6th ed. 193  
—6; Mau. & Poll. 20—2; Ad.  
Cont. 5th ed. 141; 17 & 18 Vict.  
c. 104, ss. 55, 57.

(d) 1 Cruise T. 12, c. 2, § 6.

fund out of the control of the owner, and appropriate it in favour of another person, amounts to an equitable assignment. So that an agreement between a debtor and a creditor that the debt shall be paid out of a specified fund coming to the debtor, will operate as an equitable assignment. And so an order given by a debtor to his creditor upon a person owing money to such debtor or holding funds belonging to him, directing such person to pay the creditor out of such money or funds, will amount to an irrevocable equitable assignment of such money or funds or a sufficient part thereof, if made in consequence of a direct engagement (a). And if the person so ordered to pay the assignee, nevertheless pays the assignor, he will be made to pay over again to the assignee, even though the assignor commenced an action against him (b). But where personal property is assigned, delivery is necessary to complete the transaction, or at least that which is tantamount to or is the nearest approximation to delivery of which the property is susceptible. Where the assignment is for valuable consideration, it is not indeed necessary, at least in equity, as between the vendor and vendee, or mortgagor and mortgagee, except to prevent the vendee or mortgagee from losing the property by a subsequent secret disposition by the vendor or mortgagor; but it is required for the protection of third persons, who might otherwise be deceived by apparent possession and ownership remaining in a person who in fact is not the owner (c). Where the

Pr. III. T. 12,  
Ch. 2, s. 11.

(a) 2 Spence's Eq. Jur. 856, 860—1, 907; Coote Mortg. 3rd ed. 234; 2 Tudor's Leading Cases, 574; *Rom v. Dawson*, 1 Ves. 330; *Ex parte South*, 2 Swans. 392; *Lett v. Morris*, 4 Simons 607; *Burn v. Calvalho*, 4 My. & Cr. 690; *L'Estrange v. L'Estrange*, 13 Beav. 281; *Ex parte Steward*, 3 M. D. & De G. 265; *Rodick v. Gandell*, 1 D. M. & G. 777; *Diplock v. Hammond*, 2 Sm.

& Gif. 141; 5 D. M. & G. 320; *Watson v. Duke of Wellington*, 1 R. & M. 602; *Malcolm v. Scott*, 3 Hare 39; *Chowne v. Baylis*, 31 Beav. 351.

(b) *Jones v. Farrell*, 1 D. & J. 208.

(c) See remarks of L. J. Turner in *Ex parte Boulton*, 1 D. & J. 178—9; *Stansfield v. Cubitt*, 2 Gif. 382; 2 D. & J. 222; *Warriner v. Rogers*, L. R. 16 Eq. 340.

Pr. III. T. 12,  
Ch. 2, s. 11.

assignment is voluntary, it is necessary even between the parties themselves; because equity will not enforce an imperfect voluntary assignment. Hence, in the case of chattels in possession, delivery of possession is necessary; and in the case of an assignment by way of mortgage of chattels to be brought upon certain premises, some act tantamount to taking of possession is necessary on the part of the mortgagee, to perfect his title; and if he neglects to do some such act, the title of an execution creditor who takes possession will be preferred (*a*). In the case of a bond debt, delivery of the bond and notice to the debtor are requisite. And in the case of a trust fund, the trustee being the legal depositary, formal notice ought to be given to him by the assignee, and not by a stranger, to make him a trustee for the assignee. So that if a prior assignee neglects to give notice to the trustee, and a subsequent assignee, after inquiry of the trustee and at the time of his assignment, is unaware of the prior assignment, and gives notice to the trustee of his own assignment, he thereby gains priority over the first assignee (*b*). And this is equally the case whether the assignment was by the owner of the property himself or by his legal personal representative (*c*). But if a policy of insurance is deposited with a person to secure an equitable mortgage to him he will have priority over a second equitable mortgagee, though the first did not give notice to the company, and the second mortgagee did give such notice. For, an equitable mortgagee without possession of the deeds must be postponed to another who has the deeds (*d*). And assignees

(*a*) *Holroyd v. Marshall*, 2 D. F. & J. 596; 10 H. L. Cas. 191.

(*b*) Story's Eq. Jur. § 1047; 2 Spence's Eq. Jur. 764, 855—857; 2 Bl. Com. 441—2; Coote Mortg. 3rd ed. 231, 232; *Dearle v. Hall*, *Lovridge v. Cooper*, 3 Russ. 1; *Meek v. Kettlewell*, 1 Hare 464; 1 Phil. 342; *Bridge v. Beadon*, L. R.

3 Eq. 664; *Lloyd v. Banks*, L. R. 4 Eq. 222; *In re Brown's Trusts*, L. R. 5 Eq. 88; and see *infra*, Ch. 6, on Void and Voidable Deeds.

(*c*) *In re Freshfield's Trust*, L. R. 11 Ch. D. 198.

(*d*) *Spencer v. Clarke*, L. R. 9 Ch. D. 137, 142—3.

in bankruptcy who neglect to give notice will lose their priority equally with particular assignees (a). It is immaterial, however, whether the notice was given before or after the assignment, provided it was given previously to notice by any other claimant (b). In the case of an assignment of an interest in a fund in Court, the assignee should obtain a stop order (c), unless the fund constitutes part of a testator's estate; in which case notice to the executor will be sufficient, without a stop order (d). In the case of an assignment of costs of suit not yet ordered to be paid, notice should be given to the parties by whom they would be payable (e). In the case of an equitable assignment of shares in a company, notice must be given to the company (f). In the case of an assignment of freight, the assignee should give notice of the assignment to the charterers (g). **2069.**

If the assignor is a legatee of the original cestui que trust, notice must also be given to the executor, if the latter has not assented to the bequest. A second incumbrancer on stock gains priority by lodging a distringas on the bank if neither party has given notice to the trustees of the fund. If a policy of life assurance is assigned, notice of such assignment must be given to the office in which the assurance is effected, to take it out of the reach of the bankrupt laws (h). In order to maintain his priority, it is sufficient if a prior assignee of the proceeds to arise from the sale of an officer's commission gives notice to the army agent of the regiment before the money reached the agent's

(a) *Re Barr's Trust*, 4 K. & J. 219; *Stuart v. Cockerell*, L. R. 8 Eq. 607; *In re Russell's Policy Trusts*, L. R. 15 Eq. 26.

(b) Sugd. Concise View, 275.

(c) *Bartlett v. Bartlett*, 1 D & J. 127; *Stuart v. Cockerell*, L. R. 8 Eq. 607.

(d) *Thompson v. Tomkins*, 2 Dr.

& Sm. 8.

(e) *Day v. Day*, 1 D. & J. 144.

(f) *Ex parte Boulton*, 1 D. & J. 163.

(g) *Brown v. Tanner*, L. R. 2 Eq. 806.

(h) Coote Mortg. 3rd ed. 231; *Thompson v. Tomkins*, 2 Dr. & Sm. 8.

PR. III. T. 12. hands, though a subsequent assignee gave notice first (a).  
CH. 2, s. 11. **2070.**

In general, notice to one of several trustees is notice to the others. Where one of the trustees is assignee, the assignment itself is notice to all the others. Where one of the trustees is assignor, the assignment itself is not notice to the others, but formal notice to the trustee who is assignor is notice to the others (b). **2071.**

“Neither a voluntary assignment by deed of a mortgage debt, accompanied by a grant, not specifying the particular estate, but of all estates held in mortgage, and by a covenant for further assurance, without delivery of the mortgage deed or notice to the mortgagor, nor the voluntary assignment of a policy of assurance retained in the hands of the assignor, and without notice given to the grantor, though accompanied by a covenant for further assurance, can be considered as a complete and effectual assignment, to be acted upon and enforced by the assignee, without any further or other act to be done by the assignor” (c). And where a person becomes a trustee of money for several creditors, and at the date of the trust deed the trustee had a charge on the share of one of them, but it is not mentioned in the deed, he will be postponed to another person who has a subsequent charge on that share, and had no notice of the trustee’s charge, but gives immediate notice of his own (d). **2072.**

Assignment  
of a term or  
of the  
residue of a  
term from a  
future time.

An assignment of a term, or of the residue of a term, to hold from the death of the assignor, is void (e); for, terms for years being anciently very short, the law regarded the continuance of a term after the death of the termor as a

(a) *Buller v. Plunkett*, 1 Johns. & Hem. 441. On this subject, see also *Webster v. Webster*, 31 Beav. 393; *Somerset v. Cox*, 33 Beav. 634.

(b) *Coote Mortg.* 3rd ed. 231; *Browne v. Savage*, 4 Drew. 635; *Willes v. Greenhill* (Nos. 1 & 2), 29

Beav. 376, 387; 4 D. F. & J. 147.

(c) *Ward v. Audland*, 8 Beav. 212.

(d) *Commissioners of Public Works v. Harby*, 23 Beav. 508.

(e) 1 Pres. Shep. T. 79; 2 Id. 251.

mere possibility, which could not be assigned. And, upon Pr. III.T.12.  
CH. 2, s. 11. the same principle, it would seem that an assignment of a term or of a residue of a term, from the death of any other person, would be void. Indeed, it would seem that an assignment cannot be made of a term from any future time; because an assignment of a term is an alienation of the whole term. But there would appear to be no reason why the residue of a term from a future time, otherwise than the death of any person, should not be assigned (a). And if a termor, instead of assigning, carves out of his term a new term of years which must end before the expiration of the original term, such a demise or underlease, which leaves a reversion in the original termor, may, like any other lease for years, be made to take effect at a future time (b), except such future time be the death of the original termor or any other person; for then there is the same reason why such an underlease should be void, as for the invalidity of an assignment of the residue of a term after the death of the assignor (c).

**2073.**

A deed of assignment by a person of all his personal estate and effects whatever, to trustees, for the benefit of creditors, passes a deed of assignment of leasehold pre- Assignment of person-  
alty passing  
a deed of  
assignment  
of lease-  
holds. mises made to him by way of mortgage, with power of sale (d). **2074.**

A contingent reversionary interest will not pass by an assignment, which, after enumerating things of the pro- Contingent  
reversionary  
interest not  
passing by  
assignment. perty whereof the assignor has the control, purports to assign other things by the general description of "all other the estate and effects whatsoever and wheresoever of or to which the assignor is now possessed or entitled" (e).

**2075.**

(a) But see 1 Pres. Shep. T. 79; Burton, § 893.

(b) Burton, § 894.

(c) See 2 Pres. Shep. T. 251.

(d) *West v. Steward*, 14 M. & W. 47.

(e) *Pope v. Whitcombe*, 3 Russ. 124.

PT. III. T. 12,  
CH. 2, s. 11.

Assignee  
taking  
subject to  
equities of  
assignor.

Generally speaking, assignees of a bond or a chose in action, other than a bill of exchange or a note, and assignees of equitable titles, whether such assignees be particular assignees or general assignees in bankruptcy or insolvency, take them subject to all the equities to which they were liable in the hand of the assignors (*a*). Assignees under general assignments, such as assignees in cases of bankruptcy and insolvency, take only such rights as the assignor or debtor had at the time of the general assignment; and consequently a prior special assignee will hold against them, without giving notice of his assignment (*b*). But the person entitled to such equities may release them, either expressly or by implication arising from his course of conduct (*c*). **2076.**

Assignee  
entitled to  
benefit of  
assignor's  
remedies  
and securi-  
ties.

Collateral  
securities  
for a debt  
assigned.

On the other hand, a purchaser of a chose in action, or of any equitable title, will be entitled to all the remedies of the seller (*d*). And in the case of assignments of debts, where the assignor has collateral securities for the debt, the assignee will be entitled to the full benefit of such securities, unless it is otherwise agreed between the parties. Thus, the assignee of a debt secured by a mortgage will, in equity, be held entitled to the benefit of the mortgage (*e*). **2077.**

[Assignments of debts and choses in action are now placed on a more certain basis by stat. 36 & 37 Vict. c. 66, s. 25 (6), which enacts, "Any absolute assignment under the hand of the assignor (not purporting to be by way of

(*a*) 4 Cruise T. 32, c. 8, § 26; Sugd. Concise View, 275—6; *Morris v. Livie*, 1 Y. & C. C. C. 380; *Ord v. White*, 3 Beav. 357; *Smith v. Parker*, 16 Beav. 119; *Mangles v. Dixon*, 3 H. L. Cas. 702; *In re Atkinson*, 2 D. M. & G. 140; *Brandon v. Brandon*, 7 D. M. & G. 365; *Clarendish v. Geares*, 24 Beav. 163; *Athenæum Life Assurance Society*

*v. Pooley*, 3 D. & J. 294; *Graham v. Johnson*, L. R. 8 Eq. 36; *Rodger v. The Comptoir d'Escompte de Paris*, L. R. 2 P. C. 393.

(*b*) Story's Eq. Jur. § 1038.

(*c*) *In re Northern Assam Tea Co.*, L. R. 10 Eq. 458.

(*d*) Sugd. Concise View, 275—6.

(*e*) Story's Eq. Jur. § 1047 a.



charge only), of any debt or other legal chose in action, Pr. III. T. 12, CH. 2, s. 11. of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor;” with a provision to meet the case of such an assignment being disputed, or of the existence of conflicting claims to the debt or chose in action assigned.] **2077a.**

By the stat. 22 & 23 Vict. c. 35, s. 21, “Any person shall have power to assign personal property, now by law assignable including chattels real, directly to himself and another person or other persons or a corporation, by the like means as he might assign the same to another.” Assignment to the assignor himself, and another or others. **2078.**

## SECTION XII.

### *Of a Defeasance.*

A defeasance is a collateral deed, containing certain conditions upon which an interest created or transferred by another deed may be defeated. Pr. III. T. 12, CH. 2, s. 12. In the case of things executed, such as an estate of freehold in land, the defeasance must be made at the same time with the deed creating or transferring the estate. But terms for years, and other chattels, and things executory, such as trusts and uses while they are executory, rents, annuities, bonds, statutes, recognisances, judgments, conditions, and covenants, may be defeated by defeasances made subsequent

PT. III. T. 12,  
CH. 2, s. 12. to the time of their creation by all those who are interested (a). **2079.**

A defeasance is of the same import and efficacy as a proper condition subsequent. The only difference is, that a condition is inserted in the same deed as that which creates or transfers the interest to be defeated; whereas a defeasance is contained in a distinct deed (b). **2080.**

Defeasances are seldom resorted to in the present day; and indeed they are very objectionable, as they may be made an instrument of fraud (c). **2081.**

### SECTION XIII.

#### *Of a Disclaimer (d).*

PT. III. T. 12,  
CH. 2, s. 13. A disclaimer is a deed of renunciation of a grant, devise, or bequest. **2082.**

Definition.

When an estate is conveyed or devised to any person, he may by deed disclaim the conveyance or devise, provided no act has been done to show an assent (e). **2083.**

Where two or more persons are grantees or devisees in joint tenancy, the estate will entirely vest in the person or persons who has or have not disclaimed. But if all the grantees or devisees disclaim, then, as well as when a single grantee or devisee disclaims, the estate will descend to or vest in the heir of the grantor or devisor. And in case there are trusts created by the grant or devise, a Court of Equity will enforce the execution of the trusts (f). **2084.**

(a) 2 Bl. Com. 327; Co. Litt. 236 b, 237 a; 3 Jarm. and Byth. by Sweet, 681—683, 685; 2 Rop. Leg. by White, 323; 1 Pres. Shep. T. 126; 2 Pres. Shep. T. 396; 4 Cruise T. 32, c. 8, § 27; Watk. Conv. 3rd ed. by Prest. 196—7.

(b) 4 Cruise T. 32, c. 7, § 24; 2 Pres. Shep. T. 396.

(c) Watk. Conv. 3rd ed. by Prest. 196.

(d) See infra, Ch. 6, s. 6, On the Avoidance of an Estate by Disagreement.

(e) 3 Jarm. & Byth. by Sweet, 698; *Begbie v. Crook*, 2 Bing. N. C. 70; Watk. Conv. 3rd ed. by Prest. 23; *Bence v. Gilpin*, L. R. 3 Ex. 76.

(f) 3 Jarm. & Byth. by Sweet, 698; see infra, T. 12, Ch. 6, s. 6.

## CHAPTER III.

## OF THE DIFFERENT KINDS OF STATUTORY CONVEYANCES.

NOT reckoning those deeds which existed at common law, Pt. III. T. 12, CH. 3. and, when made to uses, operate under the Statute of Uses, such as feoffments and bargains and sales to uses, there are (as already observed) about ten kinds of statutory deeds :—

1. Covenants to stand seised.
2. Deeds of Lease and Release.
3. Statutory Releases.
4. Statutory Grants, that is, Grants to Uses under the Statute of Uses, and the stat. 8 & 9 Vict. c. 106, s. 2.
5. Deeds to Lead and Declare the Uses of other assurances.
6. Deeds of Revocation of Uses.
7. Deeds of Appointment under Powers.
8. Leases under Powers.
9. Bargains and Sales under the Act for the Abolition of Fines and Recoveries.
10. Concise Conveyances and Leases under the statutes 8 & 9 Vict. c. 119 (repealed by stat. 44 & 45 Vict. c. 41), 8 & 9 Vict. c. 124, and 25 & 26 Vict. c. 53. [Also Statutory Mortgages and Short Forms of Deeds under stat. 44 & 45 Vict. c. 41 (Appendix).] 2085.

## SECTION I.

*Of a Covenant to stand seised.*

A covenant to stand seised to uses is a conveyance by which a person seised of lands covenants that he will stand seised of the same to the use of his present or intended

Pt. III. T. 12,  
CH. 3, s. 1.  
Definition.

Pr. III. T. 12,  
Ch. 3, s. 1.

wife, or his parent, legitimate child, kinsman, or kinswoman. **2086.**

Operative  
words.

The proper words of a covenant to stand seised are, "covenant to stand seised to the use of A.," etc. But any other words will suffice, which import an intent to raise a use; insomuch that the words "bargain and sell," or "give, grant, and confirm to the use of A.," have been held sufficient. But a mere covenant that at a future time lands shall descend, remain, or be to or with A., has been held not to be a covenant to stand seised (*a*). **2087.**

Who may  
convey, and  
what may  
be conveyed  
by this  
assurance.

Every person who is capable of being seised to the use of another may convey by this assurance (*b*). The covenantor must have a vested legal estate of freehold, in possession, reversion, or remainder, in the lands or hereditaments, at the time of the execution of the covenant to stand seised (*c*). A person cannot covenant to stand seised of lands which he may afterward acquire (*d*). And a joint tenant in fee cannot covenant that he will stand seised of his companion's moiety (*e*). As uses of an estate for years are not executed by the Statute of Uses, such an estate cannot be transferred by a covenant to stand seised. But as the statute does execute uses for years of freehold estates, an estate for years may be created out of a freehold estate by a covenant to stand seised (*f*). **2088.**

Considera-  
tion.

The consideration in a covenant to stand seised must be either lawful blood or marriage. The consideration of blood extends to a parent or legitimate child, kinsman, or kinswoman. The consideration of marriage extends to a marriage had or intended with the covenantor or any of his blood (*g*). **2089.**

(*a*) See 4 Cruise T. 32, c. 10, § 2, 5, 6.

(*b*) 4 Cruise T. 32, c. 11, § 7.

(*c*) 3 Jarm. & Byth. by Sweet, 670; Watk. Conv. 3rd ed. by Prest. 197—8.

(*d*) 4 Cruise T. 32, c. 10, § 10.

(*e*) Id. § 11.

(*f*) 3 Jarm. & Byth. by Sweet, 670.

(*g*) 3 Jarm. & Byth. by Sweet, 671—673; Co. Litt. 123 a, n. (8);

It is the difference in the consideration, rather than in the operative words, which constitutes the essential distinction between a bargain and sale and a covenant to stand seised. So that where a deed is made simply in consideration of a sum of money, though in favour of a son, it will not operate as a covenant to stand seised (*a*). And if a person for a pecuniary consideration covenants to stand seised to the use of a purchaser, it is a bargain and sale, and, if enrolled, is valid and effectual, as a bargain and sale under the Statute of Uses, to convey the estate to the purchaser. And, on the other hand, if a person for natural love and affection bargains and sells his lands to the use of his wife, it is a covenant to stand seised, and as such, without enrolment, vests the estate in the wife (*b*). **2090.**

Pr.III. T.12,  
Ch. 3, s. 1.

Difference  
in the con-  
sideration  
constitutes  
the distinc-  
tion be-  
tween a  
covenant to  
stand seised  
and a bar-  
gain and  
sale.

A use will not arise on a covenant to stand seised to the use of a son-in-law, an uncle-in-law, or a brother-in-law (*c*). **2091.**

To whom a  
use will not  
arise.

We have seen that a man may covenant to stand seised to the use of his wife. But if he covenants with his wife herself, this is void at law; because husband and wife are considered as one person, and no man can covenant with himself. He must covenant with another person to stand seised to the use of his wife (*d*). **2092.**

Covenant  
to stand  
seised to use  
of a wife  
should not  
be entered  
into with  
herself

A deed may operate as a covenant to stand seised, though the use is not to arise till after the death of the covenantor. In such a case the estate continues in the covenantor till a lawful use arises (*e*). **2093.**

Use after  
covenantor's  
death.

In consequence of the 4th and 5th sections of the

Creation of  
a rent.

4 Cruise T. 32, c. 10, § 12, 15, 18 ;  
Watk. Conv. 3rd ed. by Prest. 199.

(*c*) 3 Jarm. & Byth. by Sweet,  
674.

(*a*) 4 Cruise T. 32, c. 10, § 23, 24.

(*d*) 3 Jarm. & Byth. by Sweet,  
672.

(*b*) Co. Litt. 271 b, n. (1), VI., 1;  
Watk. Conv. 3rd ed. by Prest. 200.

(*e*) 4 Jarm. & Byth. by Sweet,  
111 ; 4 Cruise T. 32, c. 10, § 29.

Pr.III. T.12, CH. 3, s. 1. Statute of Uses, a rent may be created by a covenant to stand seised (a). 2094.

Disuse of  
this assur-  
ance.

Covenants to stand seised are now wholly disused (b). 2095.

## SECTION II.

### *Of a Lease and Release.*

Pr.III. T.12,  
CH. 3, s. 2.

Description  
of this  
assurance.

A conveyance by lease and release consists of two distinct deeds: first, a lease, or rather a bargain and sale, under the Statute of Uses, for some nominal pecuniary consideration, for one year, which, without any enrolment, vested in the lessee or bargainee the use of the term for a year, and which the Statute of Uses converted into a vested estate, serving as a foundation for a release to work upon; or, if the conveying party could not stand seised to a use (as in the case of a conveyance by a corporation), then a common law demise, perfected by actual entry; secondly, a common law release of the freehold and reversion to the lessee, or bargainee, dated on the day following the day of the date of the lease, and operating by way of enlargement of the estate for a year so created by the lease or bargain and sale (c). 2096.

Where  
recital of  
lease for a  
year was  
sufficient.

Even before the stat. 4 Vict. c. 21, the recital of the lease for a year in the release was sufficient of itself for establishing the conveyance against the releasor and all who claimed under him. But if the rights of a stranger could be affected, the loss of the deed of lease must, as against him, have been proved (d). But by s. 2 of the

(a) 4 Cruise T. 32, c. 10, § 30.

(b) 3 Jarm. & Byth. by Sweet, 677; 1 Sugd. Pow. Introd. p. xi.

(c) See 2 Bl. Com. 339; Co. Litt. 48 a, n. (2), 207 a, n. (3), 270 a, n.

(3), 271 b, n. (1), vi., 2; Burton, § 148; 4 Cruise T. 32, c. 11, § 1; Watk. Conv. 3rd ed. by Prest. 184; infra, Part IV. T. 1, Ch. 8.

(d) Burton, § 481.

**stat. 4 Vict. c. 21**, “where, in or by any deed or instrument of release of freehold estates executed before the 15th day of May, 1841, any deed or instrument of bargain and sale or lease for a year for giving effect to such deed or instrument of release shall be recited, or by any mention thereof in such deed or instrument of release appear to have been made or executed, such recital or mention thereof shall be deemed and taken to be conclusive evidence of the deed or instrument of bargain and sale or lease for a year so recited or mentioned having been made and executed; and such deed or instrument of release shall also have the like effect as if the same had been executed after the 15th day of May, 1841 (*a*), whether such deed or instrument of bargain and sale or lease for a year shall or shall not have been lost or mislaid, or may or may not be produced.” **2097.**

Pt.III. T.12,  
Ch. 3, s. 2.

As the deed of release operates as a common law conveyance, there is no necessity for any consideration in it (*b*). **2098.**

Consideration.

The person or persons to be the releasee or releasees in the release should be the bargainee or bargainees in the lease for a year (*c*). **2099.**

Who should be the releasee.

In the case of a lease and release to uses, the seisin is in the releasee without any agreement or assent on his part, and will serve the uses declared on the release. Nor would a subsequent disagreement by the releasee defeat the uses declared in the release (*d*). **2100.**

Releasee seised and uses executed without his assent.

Hereditaments corporeal and incorporeal, in possession, remainder, or reversion, might be conveyed by lease and release (*e*). And although a remainder or reversion might be conveyed by a mere grant, yet it was usually conveyed

Where lease and release adopted.

(*a*) See *infra*, par. 2104.

(*d*) 4 Cruise T. 32, c. 12, § 45.

(*b*) 4 Cruise T. 32, c. 11, § 13.

(*e*) 4 Cruise T. 32, c. 11, § 8, 11 ;

(*c*) 3 Jarm. & Byth. by Sweet,

Co. Litt. 270 a, n. (3).

247, 248.

PT. III. T. 12,  
CH. 3, s. 2.

by lease and release, in order to save the necessity of proving the existence of the particular estate, and to guard against the consequences of the mistake, if it should turn out that the estate was not in fact an estate in remainder or reversion. And the same mode of conveyance was frequently adopted, rather than a mere release of right, or a confirmation or other deed, where parties had only a right, title, or collateral charge (*a*). And it was the uniform practice to make persons who had only equitable estates convey by lease and release, as in the case of a conveyance of the equity of redemption on a mortgage in fee; though any instrument which expresses an intention to transfer the beneficial ownership is sufficient in equity, and though a conveyance by lease and release of an equitable estate could have no effect at law (*b*). This course was taken in order to guard against the chance of the assurance being otherwise ineffectual, by reason of the possibility of the parties having the legal estate. **2101.**

Lease and  
release has  
no tortious  
operation.

A conveyance by lease and release did not divest any estate, or create a discontinuance or forfeiture (*c*), but only passed what lawfully might pass. **2102.**

Disuse of  
this convey-  
ance.

This conveyance is now disused, in consequence of the enactments noticed in the next two sections. **2103.**

### SECTION III.

#### *Of a Statutory Release.*

PT. III. T. 12,  
CH. 3, s. 3.

By the stat. 4 Vict. c. 21, s. 1, it is enacted, "that every deed or instrument of release of a freehold estate, or deed

(*a*) 3 Jarm. & Byth. by Sweet, 247; Watk. Conv. 3rd ed. by Prest. 247; Watk. Conv. 3rd ed. by Prest. 118, 119.

95, 109, 110, 168.

(*c*) 4 Cruise T. 32, c. 11, § 15.

(*b*) 3 Jarm. & Byth. by Sweet,



or instrument purporting or intended to be a deed or instrument of release of a freehold estate, which shall be executed on or after the 15th day of May, 1841, and shall be expressed to be made in pursuance of this Act, shall be as effectual for the purposes therein expressed, and shall take effect as a conveyance to uses or otherwise, and shall operate in all respects both at law and equity as if the releasing party or parties who shall have executed the same had also executed in due form a deed or instrument of bargain and sale or lease for a year for giving effect to such release, although no such deed or instrument of bargain and sale or lease for a year shall be executed; provided that every such deed or instrument so taking effect under this Act shall be chargeable with the same amount of stamp duty as any bargain and sale or lease for a year would have been chargeable with (except progressive duty), if executed to give effect to such deed of instrument, in addition to the stamp duties which such deed or instrument shall be chargeable with as a release or otherwise under any Act or Acts relating to stamp duties." 2104.

By the stat. 7 & 8 Vict. c. 76, s. 2, it was enacted as follows: "That every person may convey by any deed, without livery of seisin or enrolment, or a prior lease, all such freehold land as he might before the passing of this Act have conveyed by lease and release; and every such conveyance shall take effect as if it had been made by lease and release: Provided always, that every such deed shall be chargeable with the same stamp duty as would have been chargeable if such conveyance had been made by lease and release." This was repealed by the stat. 8 & 9 Vict. c. 106; but by s. 2 of that statute, it was enacted "that, after the said 1st day of October, 1845, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed

PT. III. T. 12,  
CH. 3, s. 3. to lie in grant as well as in livery; and that every deed which, by force only of this enactment, shall be effectual as a grant, shall be chargeable with the stamp duty with which the same deed would have been chargeable in case the same had been a release, founded on a lease or bargain and sale for a year, and also with the stamp duty (exclusive of progressive duty) with which such lease or bargain and sale for a year would have been chargeable." 2105.

By the stat. 13 & 14 Vict. c. 97, s. 6, the duty payable in respect of a lease for a year under the last of these Acts is repealed, as regards deeds bearing date after the 10th of October, 1850. 2106.

#### SECTION IV.

##### *Of a Statutory Grant.*

PT. III. T. 12,  
CH. 3, s. 4. This is a conveyance by virtue of the stat. 8 & 9 Vict. c. 106, s. 2, whereby it is enacted "that all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery." 2107.

#### SECTION V.

##### *Of a Deed to lead or Declare Uses, and of a Deed of Revocation of Uses.*

PT. III. T. 12,  
CH. 3, s. 5. I. As a fine sur cognizance de droit come ceo, etc., and a recovery conveyed a clear fee simple to the cognizee or recoveror, these assurances could not have been made to answer the purposes of family settlements, unless their operation had been subjected to the direction of deeds wherein uses were particularly expressed. A deed thus expressing the uses of a fine or recovery, if it preceded the fine or recovery, is termed a deed to lead the uses;

I. Nature of  
deeds to lead  
or declare  
uses.

if it followed the fine or recovery, it is called a deed to declare the uses (*a*). 2108.

PT. III. T. 12,  
CH. 3, s. 5.

By the stat. 4 Anne c. 16, s. 15, reciting that it had been doubted, whether, since the Statute of Frauds, the declarations or creations of uses, trusts, or confidences of any fines or recoveries, manifested by deeds made after the levying or suffering such fines or recoveries, were good, it is thereby declared, that all declarations or creations of any uses, trusts, or confidences of any fines or common recoveries of any lands, etc., manifested and proved by any deed then made or thereafter to be made by the party who was by law enabled to declare such uses or trusts, after the levying or suffering any such fines or recoveries, were and should be as good and effectual in the law as if the Statute of Frauds had not been made (*b*). 2109.

Stat. 4 Anne  
c. 16, s. 15,  
as to deeds  
to declare  
uses.

Whether a fine or recovery is in every respect in accordance with the deed to lead the uses thereof, or not, no averment is admissible to prove, that, after the making of such deed, and before the assurance, it was agreed that the assurance should be to other uses than those expressed in such deed (*c*). But if another agreement was made by a second deed or writing, executed previously to the fine or recovery by all who were parties to the first deed and were concerned in interest, the fine or recovery was to the uses of such second deed (*d*). If a deed intended to declare the uses varied from the fine or recovery, it did not operate as a declaration of the uses thereof (*e*). 2110.

Variance  
between fine  
or recovery  
and deed to  
lead or  
declare uses.

The right of declaring the uses of a fine or recovery was precisely co-extensive with the quantity and nature of the estate or interest which each of the parties had in the lands. If, therefore, a tenant for life and the person entitled to the remainder or reversion joined in levying a

Measure of  
right of  
declaring  
uses.

(*a*) 2 Bl. Com. 363 ; 4 Cruise T. 2 Pres. Shep. T. 520.  
32, c. 12, § 10.

(*b*) 4 Cruise T. 32, c. 12, § 22. 12, 15 ; 2 Pres. Shep. T. 520.

(*c*) 4 Cruise T. 32, c. 12, § 11, 12; (*e*) 4 Cruise T. 32, c. 12, § 18.

fine or suffering a recovery, they might declare the uses according to their respective estates in the land (a). **2111.**

II. Deeds of revocation of uses.

II. Deeds of revocation of uses are deeds revoking uses declared by a former deed, by virtue of a power of revocation contained in such former deed (b). **2112.**

## SECTION VI.

### *Of a Deed of Appointment under a Power (c).*

#### *1. The mode of executing Powers.*

Pr.III. T.12,  
CH. 3, s. 6.

Forms must  
be observed.

Except in cases within the 10th section of the stat. 1 Vict. c. 26 (d), and the 12th section of the stat. 22 & 23 Vict. c. 35 (e), the forms which are required by a power must be strictly observed (f). This rule is the same even in the case of a power of revocation of a voluntary settlement reserved to the original owner of the estate ; for he may feel conscious of such infirmity of mind as to require that all future dispositions to be made by him should be attended with such solemnities as may effectually prevent surprise and imposition (g). A liberal construction, however, is usually put on the words of a power (h). **2113.**

Formalities  
must be  
perfected in  
donee's  
lifetime.

It is generally necessary that every prescribed formality, even though it be external to the appointment (such as enrolment), should be perfected in the lifetime of the donee of the power (i). **2114.**

By what  
instrument  
a power may  
be executed.

Where the mode of execution is not defined, a power may be exercised either by deed or will, or even by a simple unattested note in writing (j). **2115.**

(a) 4 Cruise T. 32, c. 12, § 40.

(b) See 2 Bl. Com. 339.

(c) On *Powers, as distinguished from appointments under them*, see supra, p. 387 ; and on *Lease under Powers*, see next section.

(d) See infra, par. 2127.

(e) See infra, par. 2128.

(f) 1 Sugd. Pow. 250, 252 ; Co. Litt. 271 b, n. (1), vii. 2.

(g) 4 Cruise T. 32, c. 16, § 2 ; 2 Sugd. Pow. 99.

(h) 1 Sugd. Pow. 255.

(i) 1 Sugd. Pow. 314.

(j) 1 Sugd. Pow. 247 ; Watk. Conv. 3rd ed. by Prest. 140.

Where a power, whether it be a common law authority given by will, or a power operating under the Statute of Uses, may be executed by deed, it may be executed by feoffment, bargain, and sale, covenant to stand seised, statutory grant, or, whilst that mode of assurance remained it might have been exercised by lease and release, with or without a fine. But these assurances, so far as they may be, or may have been, employed for the purpose of exercising powers of appointment, do not operate as feoffments, bargains, and sales, covenants to stand seised, statutory grants, leases and releases, or fines, but as declarations of the uses under the power. And hence, if a power limited by way of use is executed by any of these assurances, upon which uses are declared, the feoffee, etc., as the appointee of the first use, will be invested with the legal estate by force of the Statute of Uses, and the real objects of the deed, contrary to the usual intention, will take mere trust estates (a). 2116.

Pt. III. T. 12,  
Ch. 3, s. 6.

Execution  
by an ordi-  
nary assur-  
ance.

Under the combined operation of the 24th and 27th sections of the stat. 1 Vict. c. 26 (b), a will may be a good execution of a power, though made before the power was created (c). 2117.

Power  
executed by  
a prior will.

A power may be executed by any words indicating an intention to exercise it (d). But such technical expressions as are necessary in a deed at common law are equally necessary in a deed or other act inter vivos in execution of a power. And the construction of a deed executing a power is the same as that of a deed at common law. So that if an estate is appointed to a person indefinitely, he will take an estate for life only (e). 2118.

What words  
required.

That which may be a complete exercise and exhaustion of a power at law may amount to a partial execution only

Total execu-  
tion at law  
but partial

(a) 1 Sugd. Pow. 247—8; 2 Id. No. XIX., and par. 2144, 2145.

9. 10; Co. Litt. 271 b. n. (1), vii.

(c) *Stillman v. Weedon*, 16 Sim. 26.

1. 2. See *supra*, par. 690—2.

(d) 1 Sugd. Pow. 244.

(b) See *infra*, T. 15 Ch. 1, s. 4,

(e) 1 Sugd. Pow. 532—3.

PR. III. T. 12,  
CH. 3, s. 6.

execution in  
equity.

in equity. Thus, if a man, having a general power of appointment, appoints the fee by way of mortgage, the power is wholly executed at law; but as equity considers a mortgage merely a security for the debt, it operates in equity as a partial execution only (a). 2119.

Execution  
at different  
times and  
over diffe-  
rent parts  
of the pro-  
perty.

Powers of appointment and revocation may be executed at different times over different parts of the property, or over the whole property, but not to the full extent of the power. So that where a man has a general power of appointment, he may appoint an estate for life at one time, and the fee at another time (b). 2120.

Creation of  
distinct  
interests  
under a  
power of ap-  
pointment  
in fee.

There ought to be no trifling distinctions between a power of appointment in fee and an estate in fee, upon merely technical grounds. The power must not be exceeded, nor its directions evaded; but where there is no prohibition, everything which is legal and within the limits of the authority should be supported; so that a power to appoint a fee, with no prohibition against giving a less estate, ought to be held to authorize any legal limitations within the scope of the power which could be served out of a commensurate estate, that is, an estate in fee. Hence, where a person had a power of appointing to one or more of his children in fee, and he, in exercise of his power, whether referring to it or not, devised the lands to his wife for life, to maintain and educate his children, and to provide portions for them, with remainder to his eldest son in fee, it was held by Sir E. Sugden, when Lord Chancellor of Ireland, that the gift of the life estate to the wife was void, as she was not an object of the power, but that the devise to the son was a good appointment, though in remainder; and that the direction for maintenance and education of the children, and the

(a) 1 Sugd. Pow. 343 : 4 Cruise  
T. 32, c. 16, § 42.

T. 32, c. 16, § 38, 41; Watk. Conv.  
3rd ed. by Prest. 145.

(b) 1 Sugd. Pow. 341—2; 4 Cruise

legacies to them, were pro tanto a good execution of the power (a). 2121.

Pr. III. T. 12,  
Ch. 3, s. 6.

A donee of a power may suspend an appointment or revocation upon a contingency (b). 2122.

Appoint-  
ment or re-  
vocation on  
a contin-  
gency.

In the case of a power to appoint an estate by deed or will, generally, without expressing in what manner it is to be executed, the deed or will is to be executed like any other deed or will; so that, if the instrument was to be a will, or "a writing of the nature of a will," and the subject of the power was personal estate, it might, before the stat. 1 Vict. c. 26, have been executed by a mere writing, without signature or attestation; while, if the property was real estate, the will must have been executed with the solemnities required by the Statute of Frauds (c). On the other hand, two witnesses, although not sufficient to a devise of an interest in land, were sufficient to an exercise of a power by will, to be attested by that number of witnesses. But by ss. 9 and 10 of the stat. 1 Vict. c. 26 (d), one uniform mode of executing a will is prescribed, whether the will is an appointment or not. 2123.

Mode of  
executing a  
deed or will  
intended as  
an appoint-  
ment.

A testamentary instrument signed, but not attested so as to render it valid as a will, is not a good execution of a power to appoint by writing signed or by will (e). 2124.

A deed executing a power should state accurately the compliance with every formality required to be observed (f). And in general (at least so far as the stat. 22 & 23 Vict. c. 35, s. 12 (g), may not avoid the necessity), where powers require the attestation of facts, the facts must be stated in the memorandum of attestation (h). Thus,

Compliance  
with  
required  
formalities  
should be  
stated.

(a) *Crozier v. Crozier*, 3 Dru. & War. 353.

(b) 1 Sugd. Pow. 439, 440. See also *Caulfield v. Maguire*, 2 J. & L. 170.

(c) 1 Sugd. Pow. 280—1; 4 Cruise T. 32, c. 16. § 19, 21.

(d) See *infra*, T. 15, Ch. 1, No. II.,

and par. 2127.

(e) *In re Daly's Settlement*, 25 Beav. 456.

(f) 1 Sugd. Pow. 324.

(g) See *infra*, par. 2128.

(h) *Watk. Conv.* 3rd ed. by Prest. 148—9. See *Re Rickett's Trusts*, 1 Johns. & Hem. 70.

PT. III. T. 12,  
CH. 3, s. 6.

where a power was given of appointing by any deed under hand and seal, executed in the presence of and attested by witnesses, a deed, though in fact signed as well as sealed and delivered in the presence of two witnesses, was held to be not a good exercise of the power, in consequence of the attestation clause not expressing that the deed was signed as well as sealed and delivered (*a*). This oversight having frequently been committed, the stat. 54 Geo. 3, c. 168, was passed to remedy it by a retrospective operation, but without extending to future transactions (*b*). The word "witness," however, will be a sufficient form of attestation, if all the ceremonies are previously stated in the body of the instrument or at the conclusion of it (*c*). Where witnesses are required, but nothing is said about the witnesses attesting the execution, the power will be duly executed although the witnesses do not subscribe the indorsed attestation, or some of them do and others do not (*d*). 2125.

## II. *Relief against the Defective Execution or Non-Execution of Powers.*

Relief in  
equity  
alone.  
In whose  
favour.

Relief against a defective execution of a power can only be had in a Court of Equity, and only where the person applying for such relief is a purchaser under the donee of the power (the term purchaser including a mortgagee and a lessee), or an intended husband or a creditor of the donee of the power, or where the applicant is a wife or a legitimate child of such donee, even when not claiming as a purchaser for valuable consideration, because they are in some degree considered as creditors by nature (*e*). The like relief is extended to a charity

(*a*) *Waterman v. Smith*, 9 Sim. 629.

(*b*) *Burton*, § 450; 1 Sugd. Pow. 307—8.

(*c*) 1 Sugd. Pow. 300.

(*d*) 1 Sugd. Pow. 312—13.

(*e*) 2 Sugd. Pow. 91—94, 97—8;  
1 Story's Eq. Jur. § 95, 169, 170; 4



(a). Indeed an appointment to a charity, by any writing however informal, is valid, as the Statute of Charitable Uses supplies all defects of assurance which the donor was capable of making (b). But this equity is not extended to a mere volunteer, or even to a husband (except in the case of an intended husband, who is regarded as a purchaser for valuable consideration), or to a natural child, or to a grandchild, or to a father, or mother, or brother, or sister (c). But cases of fraud constitute an exception to this; as where the person interested in the non-execution of the power has the deed creating the power in his custody, and refuses to allow the donee of the power an opportunity of inspecting it to enable him to execute it aright (d). **2126.**

PR. III. T. 12,  
CH. 3, S. 6.

Relief is granted where there is a defect in the mode of execution: as, 1. Where the power ought to be executed by deed, but is executed by will. 2. Where, according to the old law, the power was required to be exercised by a testamentary instrument executed and attested in a particular form, but such instrument is wanting wholly in the forms of signature and attestation (e). This was no derogation from the Statute of Frauds as regarded real estate, because an appointment under a power did not take effect under that statute. But all appointments by will, made on or after the 1st of January, 1838 (f), must be executed like other wills; for by the stat. 1 Vict. c. 26, s. 10, it is enacted, that “no

Relief in case of defect in the mode of execution.

Appointments by will made on or after Jan. 1, 1838, to be executed like other wills.

Cruise T. 32, c. 17, s. 9, 15—17, 19, 20; *Morse v. Martin*, 34 Beav. 500; *In re Dykes' Estate*, L. R. 7 Eq. 337; *Kennard v. Kennard*, L. R. 8 Ch. Ap. 227.

(a) 2 Sugd. Pow. 94; 1 Story's Eq. Jur. § 95.

(b) 1 Sugd. Pow. 254; *Innes v. Sayer*, 3 Mac. & G. 606.

(c) 2 Sugd. Pow. 94—5; 1 Story's

Eq. Jur. § 95.

(d) 2 Sugd. Pow. 140; 1 Story's Eq. Jur. § 94, 199; 4 Cruise T. 32, c. 17, § 22—3.

(e) 2 Sugd. Pow. 125—6; 1 Story's Eq. Jur. § 97, 173—4; 4 Cruise T. 32, c. 17, § 7.

(f) 2 Sugd. Pow. 125—6; 1 Story's Eq. Jur. § 174.

PT.III. T.12,  
CH. 3, s. 6.

Other re-  
quired  
solemnities  
need not be  
observed.

But not  
where "a  
deed or  
writing" is  
required.

Appoint-  
ments by  
deed or  
writing not  
testament-  
ary after the  
13th of Au-  
gust, 1859.

appointment made by will in exercise of any power shall be valid, unless the same be executed in manner hereinbefore required" (a). By the same section it is enacted, as regards wills made on or after the 1st of January, 1838, that "every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity." But in *West v. Ray* (b), it was held, contrary to *Buckell v. Blenkhorn* (c), that, where a power of appointment is to be exercised by "any deed or writing" under the hand and seal of the donee, it cannot be exercised by a will executed with only the formalities required by 1 Vict. c. 26, notwithstanding the 10th section of that Act; the power not being in terms a power to appoint by will, but only by any deed or writing. 2127.

By the stat. 22 & 23 Vict. c. 35, s. 12 (13 August, 1859), "a deed hereafter executed in the presence of and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing not testamentary, notwithstanding it shall have been expressly required that a deed or instrument in writing made in exercise of such power should be executed or attested with some additional or other form of execution or attestation of solemnity: Provided always, that this provision shall not operate to defeat any direction in the instrument creating the

(a) 2 Sugd. Pow. 125—6.

(b) 1 Kay 385; see *Collard v. Sampson*, 4 D. M. & G. 224; *Orange*

*v. Pickford*, 4 Drewry 363; *Taylor v. Meads*, 13 W. R. 394 (L. C.).

(c) 5 Hare 131.

power that the consent of any particular person shall be necessary to a valid execution, or that any act shall be performed in order to give validity to any appointment, having no relation to the mode of executing and attesting the instrument, and nothing herein contained shall prevent the donee of a power from executing it conformably to the power by writing or otherwise than by an instrument executed and attested as an ordinary deed, and to any such execution of a power this provision shall not extend." 2128.

Pr. III. T. 12,  
Ch. 3, s. 6.

Relief is granted even where there is only an intention to execute the power, if it is clearly manifested in writing (a). 2129.

Relief, though there is only an intention to execute.

Equity cannot dispense with the regulations prescribed, where the power is created by statute (at least where they constitute the apparent policy and object of the statute), or with the consent of persons whose consent is required. Nor will the regulations prescribed be dispensed with, where such dispensation would wholly or partially defeat the object of the donor of the power; as where, in the case of a lease under a power, the best rent is required to be reserved, and it is not reserved. Nor will an execution by an absolute deed, or by a surrender of copyholds, instead of by will, be supported; as that would be repugnant to the power, since it would not be revocable like a will (b). Nor will a defective execution be supported, where the donee of the power afterwards executes it in due form in favour of a bonâ fide purchaser or mortgagee without notice of such defective execution; it being a maxim, that where the equities are equal, the law shall prevail (c). 2130.

Where defective execution is not relieved against.

Putting aside cases of fraud and election, and cases of an intention to execute manifested in writing, equity will

No relief in cases of non-execution.

(a) 2 Sugd. Pow. 115, 116; *Garth v. Townsend*, L. R. 7 Eq. 220; *Kennard v. Kennard*, L. R. 8 Ch. Ap. 227.

(b) 1 Story's Eq. Jur. § 96—7, 173; 2 Sugd. Pow. 128, 138; *Watk. Conv.* 3rd ed. by Prest. 140.

(c) 2 Sugd. Pow. 103—4.

PT. III. T. 12,  
CH. 3, B. 6.

not interpose in the case of the non-execution of a mere power ; for that would be depriving the donee of the right of discretion in regard to the exercise of the power. But where a power is coupled with a trust, that is, where a man is invested with a trust to be effectuated by the execution of a power, it is his duty to exercise the power ; and if he does not execute it, equity will carry the trust into execution, even though the person in whose favour it is to be executed is a mere volunteer. An instance of this kind occurs where trustees are empowered to sell an estate, and apply the proceeds upon certain trusts (a).  
**2131.**

### III. *Excessive Execution of Powers.*

Complete  
but exces-  
sive execu-  
tion.

Where there is a complete but excessive execution, the excess alone is void, if it is of such a nature as to be capable of being exactly distinguished and severed from that which would constitute a complete and proper appointment : as where a man, having a power to lease for twenty-one years, leases for forty ; or where a person having power to charge a particular sum charges a larger sum (b) ; or, in most cases, where an appointment is made to persons, some of whom are not objects of the power (c) ; or where a distinct unauthorised limitation, trust, or condition is super-added (d). **2132.**

Effect of  
engrafting  
void trusts  
on an ap-  
pointment,  
or illegally  
modifying  
the interest  
appointed.

Where a testator, after appointing personal property in terms which, per se, would give the appointee the absolute interest, proceeds to direct, that, after the death of the appointee, the property shall be held upon trust for other persons, who are incapable of taking, the first appointee

(a) 2 Sugd. Pow. 157—160 ; 1 Story's Eq. Jur. § 98, 169, 170 ; 4 Cruise T. 32, c. 17, § 1, 25.

(b) See 2 Sugd. Pow. 75—8.

(c) 2 Sugd. Pow. 62, 66—7.

(d) 2 Sugd. Pow. 73, 76, 84 ; 4 Cruise T. 32, c. 16, § 49 : *Watt v.*

*Creykè*, 3 Sm. & Gif. 362 ; *Conx v. Foster*, 1 Johns. & Hem. 30 ; *In re Brown's Trust*, L. R. 1 Eq. 74 ; *In re Jeaffreson's Trusts*, L. R. 2 Eq. 276 ; *Ferrier v. Jay*, L. R. 10 Eq. 550 ; *Webb v. Sadler*, L. R. 8 Ch. Ap. 419.

takes the absolute interest, unaffected by the subsequent trusts (a). And where there is an absolute appointment by will in favour of a proper object of the power, and that appointment is followed by attempts to modify the interest so appointed, in a manner which the law will not allow, or to subject it to a condition, or to a trust in favour of persons not objects of the power, the Court reads the will as if the passages in which such attempts are made were swept out of it, for all intents and purposes, *i.e.*, not only so far as they attempt to regulate the quantum of interest to be enjoyed by the appointee in the settled property, but also so far as they might otherwise be relied upon as raising a case of election (b). But under a power to appoint to his children, a father may appoint a share to a daughter for life for her separate use, with remainder as she should by will appoint (c). And where, under a power of appointing to children, an appointment is made to trustees for a daughter, her intended husband, and the children of the marriage, it will be supported as an appointment to the daughter, and a settlement of the sum appointed (d). And under a power of appointment over real property among children for such estates and interests, and in such manner as the donee shall think fit, he may say that the property or his share shall be converted and held as personalty (e). 2133.

Pr. III. T. 12,  
Ch. 3, s. 6.

Under a power to charge an estate with a certain sum for the portions of daughters, the donee may limit to the separate use of a daughter, with a restraint on anticipation (f). 2134.

Appoint-  
ment for  
separate  
inalienable  
use.

Where a testator appoints several sums which together

Where tes-  
tator ap-

(a) *Harvey v. Stracey*, 1 Drewry 137—40; *Re Lord Sondes' Will*, 1 Sm. & Gif. 416.

(b) *Woolridge v. Woolridge*, 1 Johns. 63; *Rooke v. Rooke*, 2 Dr. & Sm. 38; *Churchill v. Churchill*, L. R. 5 Eq. 44.

(c) *Morse v. Martin*, 34 Beav. 500;

*Slark v. Dakyns*, L. R. 15 Eq. 307; 10 Ch. Ap. 35.

(d) *Fitz Roy v. Duke of Richmond* (No. 2), 27 Beav. 190; *Daniel v. Arkwright*, 2 Hem. & Mil. 95.

(e) *Webb v. Sadler*, L. R. 8 Ch. Ap. 419.

(f) *Dickinson v. Mort*, 8 Hare 178.

PT. III. T. 12,  
CH. 3, s. 6.

points too  
much, and  
one appoin-  
tee dies.

exceed the amount of which he has a power of appointment, and one of the appointees dies in the testator's lifetime, the sum appointed to him will go to the other appointees, and not as in default of appointment (a). 2135.

#### IV. *Fraudulent and Illusory Appointments.*

Appoint-  
ment must  
be made for  
the end  
designed.

The donee of a power should exercise it bonâ fide simply and entirely for the end designed ; and it should be a pure, straightforward, honest dedication of the property, as property, to the person to whom he affects or attempts to give it in that character: otherwise it will generally be considered as a fraud upon the power (b). Hence, where a person has a power of appointing to all or any of his children, and he exercises it in favour of one child, merely in order to remove an objection to the title of an estate, the appointment is void (c). And if a person, having a particular power to be exercised for the benefit of others, make an appointment in payment of a debt due to the appointee by the appointor, or upon the terms or for the purpose (whether made known to the appointee at the time, or not) of securing some benefit to himself (unless it be one necessarily involved in a due regard to the objects of the power), or for the purpose of securing a benefit to some other persons who are not objects of the power, such an appointment is fraudulent, and will be set aside in equity (d): as where the donee of a power appoints a fund to one of the objects of the power, under an understanding that the latter is to lend the fund to the former, though on good security (e); or that the appointee should hold the

Appoint-  
ment where-  
by a benefit  
is secured to  
the ap-  
pointor or a  
stranger.

(a) *Eales v. Drake*, L. R. 1 Ch. D. 217.

(b) *Duke of Portland v. Topham*, 11 H. L. Cas. 32; *Topham v. Duke of Portland*, L. R. 5 Ch. Ap. 40; *Pryor v. Pryor*, 2 D. J. & S. 205.

(c) *Weir v. Charnley*, 1 Ir. Eq. Rep. (N. S.) 295.

(d) See 2 Sugd. Pow. 181, 184,

191—4; *Arnold v. Hardwick*, 7 Sim. 343; *Askham v. Barker*, 12 Beav. 499; 17 Beav. 37; *Harrison v. Randall*, 9 Hare 397; *Agassiz v. Squire*, 18 Beav. 431; *Reid v. Reid*, 25 Beav. 469; *In re Huish's Charity*, L. R. 10 Eq. 5.

(e) *Arnold v. Hardwick*, 7 Sim. 343.

fund in trust for or make over a part to persons some of whom are not objects of the power (a). 2136.

Pt. III. T. 12,  
CH. 3, s. 6.

Upon the same principle, if a parent appoints an immediate portion to an infant who is not in want of it, or appoints to a child, whether infant or adult, who is seriously ill, with a view to become entitled to that which is so appointed himself, as the personal representative of such appointee in the event of his death, the appointment is void as a fraud upon the power (b). 2137.

Appoint-  
ment to an  
infant.

Where a person exercises a general power of appointment in favour of a stranger, his creditors will in equity become entitled to the property appointed, if there is a deficiency of assets (c). 2138.

Rights of  
creditors  
against a  
general  
appointee.

Where a person had a power of appointing an estate or a sum of money unto and among his children or any other class of persons, in such shares and proportions as he should think proper, there, prior to the 16th of July, 1830, each of the class must in equity have had such a fair and reasonable share as was not illusory: otherwise an appointment to them prior to that date was void in equity (d). But by the stat. 1 Will. 4, c. 46, s. 1, illusory appointments made after the 16th of July, 1830, are valid in equity as well as at law (e). The Act is in these words: "Whereas, by deeds, wills, and other instruments, powers are frequently given to appoint real and personal property amongst several objects, in such manner that none of the objects can be excluded by the donee of the power from a share of such property: and whereas appointments in exercise of such powers whereby an unsubstantial, illusory, or nominal share of the property affected thereby is appointed to or left unappointed to devolve upon any

Illusory ap-  
pointments.

(a) *Birley v. Birley*, 25 Beav. 299; *Re Marsden's Trust*, 4 Drew. 594.

(b) 2 Sugd. Pow. 194; *Wellesley v. Earl of Mornington*, 2 K. & J. 143; *Beere v. Hoffmister*, 28 Beav. 101.

(c) 2 Sugd. Pow. 102, 158—9; 1 Story's Eq. Jur. § 169; 1 Lead. Cas. in Eq. 3rd ed. 210; 2 Id. 121—2.

(d) 4 Cruise T. 32, c. 16, § 58.

(e) See *Gainsford v. Dunn*, L. R. 17 Eq. 405.

PT. III. T. 12,  
CH. 3, s. 6.

one or more of the objects thereof, are invalid in equity, although the like appointments are good and binding in law: and whereas considerable inconvenience hath arisen from the rule of equity relative to such appointments, and it is expedient that such appointments should be as valid in equity as at law: be it therefore enacted, that no appointment which from and after the passing of this Act shall be made in exercise of any power or authority to appoint any property, real or personal, amongst several objects, shall be invalid, or impeached in equity, on the ground that an unsubstantial, illusory, or nominal share only shall be thereby appointed to or left unappointed to devolve upon any one or more of the objects of such power; but that every such appointment shall be valid and effectual in equity as well as at law, notwithstanding that any one or more of the objects shall not thereunder, or in default of such appointment, take more than an unsubstantial, illusory, or nominal share of the property subjected to such power" (s. 1). "Provided always, and be it further enacted, that nothing in this Act contained shall prejudice or affect any provision in any deed, will, or other instrument creating any such power as aforesaid, which shall declare the amount of the share or shares from which no object of the power shall be excluded" (s. 2). "Provided also, and be it further enacted and declared, that nothing in this Act contained shall be construed, deemed, or taken, at law or in equity to give any other validity, force, or effect, to any appointment, than such appointment would have had if a substantial share of the property affected by the power had been thereby appointed to or left unappointed to devolve upon any object of such power" (s. 3). **2139.**

By the stat. 37 & 38 Vict. c. 37, passed July 30th, 1874, where a certain amount or share (if any) is not required to be appointed to an object of the power, it is not even



necessary to appoint any amount or share at all to such object. The Act is in these words : “ Whereas by deeds, wills, and other instruments, powers are frequently given to appoint real and personal property amongst several objects in such manner that no one of the objects of the power can be excluded, or some one or more of the objects of the power cannot be excluded by the donee of the power from a share of such property, but without requiring a substantial share of such property to be given to each object of the power, or to each object of the power who cannot be excluded : And whereas instruments intended to operate as executions of such powers are frequently invalid in consequence of the donee of the power appointing in favour of some one or more of the objects of the power to the exclusion of the other or others, or some other or others of such objects, and it is expedient to amend the law so as to prevent such intended appointments failing : Be it therefore enacted as follows :

PT. III. T. 12,  
CH. 3, s. 6.

“ 1. That no appointment, which from and after the passing of this Act shall be made in exercise of any power to appoint any property, real or personal, amongst several objects, shall be invalid at law or in equity on the ground that any object of such power has been altogether excluded, but every such appointment shall be valid and effectual notwithstanding that any one or more of the objects shall not thereby or in default of appointment take a share or shares of the property subject to such power. **2140.**

Appoint-  
ments to be  
valid not-  
withstand-  
ing one or  
more objects  
excluded.

“ 2. Provided always, and be it enacted, that nothing in this Act contained shall prejudice or affect any provision in any deed, will, or other instrument creating any power, which shall declare the amount or the share or shares from which no object of the power shall be excluded, or some one or more object or objects of the power shall not be excluded.” **2141.**

Proviso.

V. *The Question whether an Instrument is intended to operate as an Appointment.*

PT. III. T. 12,  
CH. 3, s. 6.

A power may be executed without being in any manner referred to, provided, in cases not within the Wills Act, the intention to execute it or to pass the property sufficiently appears (a). Where, however, a man has both a power and an interest, relating to the same property, or to different properties or portions of property, and he devises, bequeaths, or conveys generally, without in any manner indicating an intention to exercise his power, the act done will only operate, if it can, by virtue of his ownership or interest, and not in exercise of his power (b). But where a person has both a power and an interest (as where he has a general power of appointment, with a limitation to himself in fee), and he makes a disposition which is not adapted to pass his interest and would be absolutely void if it did not enure as an execution of the power, it will take effect as an appointment, if it is of the nature and executed in the manner prescribed by the power, however general it may be (c). And where a man has both a power and an interest, and he creates an estate which would not or might not endure for the period assigned to it by the terms of its creation, if it were fed out of his interest, it shall take effect by force of the power (d). 2142.

Even prior to the Wills Act, where a man had a power of appointment over certain property, but no estate in it, if he executed an instrument purporting to convey, devise, or bequeath that specific property, and the forms requisite

(a) 1 Sugd. Pow. 356 ; 4 Cruise T. 32, c. 16, § 27, 31 ; Co. Litt. 271 b, n. (1), vii. 2. And see *In re David's Trusts*, 1 Johns. 495 ; *Vyryan v. Vyryan*, 30 Beav. 65 ; *In re Teape's Trusts*, L. R. 16 Eq. 442 ; and *infra*, par. 2144.

(b) 1 Sugd. Pow. 412 ; 4 Cruise T. 32, c. 16, § 70 ; Burton, § 610 ; *Noel v. Noel*, 4 Drew. 624 ; *Wildbore v. Gregory*, L. R. 12 Eq. 482.

(c) 1 Sugd. Pow. 417 ; Co. Litt. 271 b, n. (1), vii. 2.

(d) 1 Sugd. Pow. 418.

to an execution of the power were observed, the conveyance, devise, or bequest enured as an appointment, because otherwise it would have been necessarily void, *ab initio* (a). And where an act can operate only as an exercise of a power of revocation, and all the circumstances requisite to an execution of the power are observed, the act shall be deemed an execution of the power, although no reference whatever is made to it, or to an intent to revoke (b). .

2143.

In cases under the old law, where there is no general reference to powers, and no reference to the particular power, the property comprised in it must be mentioned or in some other way there must be an intention apparent on the face of the will to operate upon it (c). But in the case of wills made on or after the 1st of January, 1838, a general gift includes real and personal property over which the testator has a general power of testamentary appointment, unless a contrary intention appears by the will (d). For by the stat. 1 Vict. c. 26, s. 27, it is enacted "that a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any

(a) 1 Sugd. Pow. 357, 377, 380 ; 1 Jarm. Wills, 2nd ed. 582—4; see *Shelford v. Acland*, 23 Beav. 1014; *Carver v. Richards*, 27 Beav. 488.

(b) 1 Sugd. Pow. 357—8.

(c) 1 Sugd. Pow. 367 — 9 ; 4 Cruise T. 32, c. 16, § 34 ; *Evans v. Evans*, 23 Beav. 1 ; V.-C. Wood's

remarks in *Hutchings v. Osborne*, 4 K. & J. 255 ; 3 D. & J. 142 ; *Reid v. Reid*, 25 Beav. 469 ; *Rooke v. Rooke*, 2 Dr. & Sm. 38. See *Att.-Gen. v. Wilkinson*, L. R. 2 Eq. 816.

(d) *Moss v. Harter*, 2 Sm. & Gif. 458 ; *Scriven v. Sandom*, 2 Johns. & H. 743 ; *Bush v. Coman*, 32 Beav. 228.

PT. III. T. 12,  
CH. 3, s. 6.

bequest of personal property described in a general manner (a), shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will." 2144.

Notwithstanding the 8th section (b) the 27th section applies to testamentary appointments by married women (c). 2145.

Where a gift is *prima facie* specific, evidence may be received as to the state of the property at the date of the will, or at the time of the testator's death, for the purpose of identifying the subject matter of the gift, so as to ascertain whether the testator meant to refer to his own property or to property over which he had only a power of appointment (d). But the Court will not infer an intention to execute a power from the mere fact of the instrument being executed in the manner required by the power, nor from any other slight circumstances of conformity, nor from the fact that otherwise there would not be sufficient to answer the purposes of the will (e). 2146.

## VI. *Appointments generally.*

Who may  
exercise a  
power.

Every person who is capable of disposing of property of which he is the owner, may exercise a power (f). 2147.

Time for  
execution.

In the absence of any indication of a contrary intent, a

(a) See *Hawthorn v. Shedden*, 3 Sm. & G. 293; *Wilday v. Barnett*, L. R. 6 Eq. 193; *In re Wilkinson's Settlement Trusts*, L. R. 8 Eq. 487; *In re Pinède's Settlement*, L. R. 12 Ch. D. 667; *Chandler v. Pocock*, L. R. 16 Ch. D. (Ap.) 648.

(b) See *infra*, Part IV. T. 1, Ch. 3, s. 1.

(c) *Bernard v. Minshull*, 1 Johns.

276; *Thomas v. Jones*, 1 D. J. & S. 63; *In re Wilkinson*, L. R. 4 Ch. Ap. 587; *Noble v. Phelps*, L. R. 2 Prob. & M. 276.

(d) *Innes v. Sayer*, 3 Mac. & G. 606.

(e) 1 Sugd. Pow. 370—1, 387; *Davies v. Thorns*, 3 De G. & Sm. 347.

(f) 1 Sugd. Pow. 181.

donee of a power may execute it at any time during his life (a). 2148. PT.III. T.12,  
CH. 3, s. 6.

It is the duty of a trustee who executes a power, to show that he has complied with the exigences required by it (b). 2149. Duty of a trustee exercising a power.

As a power limited by way of use is a mere right to appoint a use, the immediate appointee takes the first use, which the statute executes, and any use engrafted on that appointment is a second use, which the statute does not execute, and which is consequently a mere trust. It is therefore necessary to appoint immediately to the person intended to take, and not to some other person to his use, unless it is desired that he should not have the legal estate (c). But in the case of a mere common law authority, as in the case of a power given by will without the intervention of uses, an appointment, by virtue of such a power, to a person to certain uses, would not of itself vest the legal estate in him, but the legal estate would vest either in the immediate appointee or in the person to whose use the appointment was made, as would best effectuate the intention of the parties (d). 2150. Who should be the immediate appointee. Where the legal estate vests in him

Where a deed of appointment is required by a Court of Equity, or, as it would seem, by the instrument creating the power, to be executed within a limited time, an irrevocable appointment must be made within that time: an appointment with power of revocation is not a proper compliance with the requisition (e). 2151. Where an irrevocable appointment must be made.

An appointment in pursuance of a power under the Statute of Uses operates under that statute, not as a conveyance of the land, but as a substitution of a new use in the place of a former one (f). Although estates arising How an appointment operates. Estates

(a) 1 Sugd. Pow. 330—1.

(b) Sir J. Romilly, M. R., in *Morris v. Wright*, 14 Beav. 303.

(c) 1 Sugd. Pow. 229, 238—9, 242; Co. Litt. 271 b, n. (1), vii. 1.

(d) See 1 Sugd. Pow. 238—9, 242.

(e) *Piper v. Piper*, 3 My. & K. 159.

(f) 4 Cruise T. 32, c. 16, § 78; Co. Litt. 271 b, n. (1), vii. 1.

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appointed  
take effect  
as if inserted  
in the in-  
strument  
creating the  
power.

from the execution of powers owe their commencement to the deed of appointment, yet the appointee under the power does not derive his title from the appointor, or out of the estate whereof the appointor is seised, but comes in directly under the conveyance by which the power was created; and the uses created by the appointment precede the uses limited by the original conveyance, just as if the estate created by the appointment had been actually limited in such original conveyance (*a*). But the rule does not apply so as to make the interest appointed vest by relation from the time of the limitation of the power (*b*). Nor does the rule apply so as to render an interest void, like a remainder, because the particular estate determined before the power arose (*c*). **2152.**

"All the  
rest," or  
"remain-  
der" of a  
fund.

Where portions of a fund are appointed, and then "all the rest" or "remainder," it should be expressed whether this is to include shares of appointees which may lapse, or only the balance of the fund (*d*). **2153.**

[If a general testamentary power of appointment over real or personal estate is given to a person with a gift over in case such person should die without any will, and such person by will appoints the estate to a trustee for a devisee or legatee, but the trust lapses by reason of the death of the devisee or legatee in the lifetime of the appointor; then the estate appointed does not go under the gift over contained in the settlement creating the power, but becomes in effect part of the general estate of the appointor. The power of appointment is equivalent to property, and the trust results in favour of the appointor who created it (*e*).] **2153a.**

(*a*) 4 Cruise T. 32, c. 16, § 76; 2 Sugd. Pow. 22; Co. Litt. 271 b, n. (1), vii. 2; 2 Watk. Conv. 3rd ed. by Prest. 151.

(*b*) 2 Sugd. Pow. 23; Co. Litt. 271 b, n. (1), vii. 2.

(*c*) 2 Sugd. Pow. 26.

(*d*) See *In re Harries's Trust*, 1 Johns. 199.

(*e*) *In re Van Hagan, Sperling v. Rochfort*, L. R. 16 Ch. D. (Ap.) 18.

Where a testator having a power of appointing a share of a fund appoints the share to an object of the power upon the happening of a particular event, the appointment carries with it all the intermediate accretions of that share, whether in the shape of income or otherwise (a). 2153b.

PT.III. T.12,  
CH. 3, s. 6.

## SECTION VII.

### *Of Leases under Powers.*

As all leases (except under the Leases and Sales of Settled Estates Act, [or the Settled Estates Act, 1877, or the Settled Land Act, 1882]), granted by tenants for life out of their own interest determine by their death, powers are often inserted in modern settlements enabling the tenants for life to grant leases, to be valid against the persons in remainder and reversion. 2154.

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CH. 3, s. 7.

Reason of  
giving  
powers of  
leasing to  
tenants for  
life.

But, lest the tenants for life should exert these powers to the prejudice of the persons in remainder or reversion, they are in general restrained by the words of the power from making leases, except on certain conditions, by which they are obliged to secure the same advantages to those who may succeed to the estate as to themselves. It has therefore been long settled, that the restrictive parts of these powers shall be construed strictly against the tenant for life, and in favour of the remainderman and reversioner; because the conditions on which powers of this kind are given are inserted with a view to their interest (b). The instruments by which leasing powers are executed are construed more strictly than other deeds of appointment. For it being expressly required that tenants for life should execute their powers of leasing in a particular manner, that becomes a condition precedent; and if all the circumstances required by the power are not strictly followed, the power is held to be totally

Restrictions  
construed  
strictly  
against  
tenant for  
life.

(a) *Long v. Orenden*, L. R. 16 Ch. D. 681. (b) 4 Cruise T. 32, c. 15, § 1, 2.

PT. III. T. 12,  
CH. 3, s. 7.

unexecuted. So that, if a usual covenant is omitted, or if an unusual or improper covenant is inserted in a lease under a power, the lease is thereby void in its creation, and not the covenant only; and, prior to the stat. 12 & 13 Vict. c. 26, s. 3, and 13 Vict. c. 17, s. 2 (a), no acceptance of rent or other act by the person in remainder or reversion would operate as a confirmation of it (b). **2155.**

Powers to  
lease in a  
bargain and  
sale, or  
covenant to  
stand seised.

A power in a bargain and sale, to lease to any man indefinitely (although for a valuable consideration), and not to a person from whom a valuable consideration moved at the time of the execution of the deed, is void. And so, a power in a covenant to stand seised, to lease to any one indefinitely, and not to a person named in the deed and also within the consideration of blood or marriage, is void (c). **2156.**

Power may  
be exercised  
toties  
quoties.

A power of leasing may be exercised toties quoties (d). **2157.**

### I. *Usual Restrictions.*

The restrictions which are usually annexed to leasing powers relate to, 1. The instrument by which the power is to be executed. 2. The lands to be let. 3. The time when the lease is to commence. 4. Its duration. 5. The reservation. 6. The clauses and covenants required to be inserted in such leases (e). **2158.**

#### 1. *Instrument by which the Power is to be executed.*

Instrument  
usually re-  
quired

A leasing power is generally required to be executed by deed, sealed and delivered in the presence of and attested by two or more witnesses. It is also usually required that the tenant should execute a counterpart of such indenture (f). **2159.**

(a) See *infra*, par. 1276—1282.

(b) 4 Cruise T. 32, c. 15, § 3, 61, 65.

(c) 1 Sugd. Pow. 158—9; 3 Jarm.

& Byth. by Sweet, 676.

(d) 2 Sugd. Pow. 312.

(e) 4 Cruise T. 32, c. 15, § 4.

(f) 4 Cruise T. 32, c. 15, § 5



A power to make leases for life or years cannot be exercised by letter of attorney; for delegatus non potest delegare (a). 2160.

Pr. III. T. 12,  
Ch. 3, s. 7.

Leasing by  
letter of  
attorney.

## 2. *Lands to be Let.*

In many cases, powers of leasing are restrained to lands which have been usually demised to farmers, in order to prevent the tenant for life from leasing the mansion house, gardens, pleasure grounds, park, or other parts of the land usually occupied by the proprietors of the estate, and deemed necessary to the dignity of the family (b). Where a power extends to lands that have been usually let, lands which have been twice or thrice let are within the power; and so are lands which have been in lease for a very long term, say ninety-nine years, though it has recently expired (c). With this exception, lands which have been only once let do not fall within the description of lands usually let: for usus fit ex iteratis actibus. And lands not demised for the space of twenty-one years previous to the making of a lease under a power, are not considered as lands usually let (d). 2161.

Lands  
"usually  
demised."

Where there is a power of leasing any part of premises usually so leased, reserving the ancient and accustomed rents, two tenements which had previously been leased separately may be leased together under a single demise, if the rents reserved are in proper proportion (e). 2162.

Leasing  
distinct  
premises  
together.

Lands comprised in a power may be, and frequently are, demised in the same lease with lands not comprised in the power. But in such a case there should be several demises with distinct reservations (f). Joining, at an entire rent, even though it be a proportionately larger rent, pre-

(a) 1 Jarm. & Byth. by Sweet, 429; 1 Sugd. Pow. 213.

(b) 4 Cruise T. 32, c. 15, § 7.

(c) See 2 Sugd. Pow. 317—319; 4 Cruise T. 32, c. 15, § 8, 9.

(d) 4 Cruise T. 32, c. 15, § 8, 9.

(e) *Doe d. Earl of Egremont v. Williams*, 11 Ad. & E. (N. S.) 688.

(f) 2 Sugd. Pow. 417.

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CH. 3, s. 7.

mises within a power of leasing at the accustomed rent, with other premises not within the power, is fatal to the lease (a). **2163.**

### 3. *Commencement of the Lease.*

Where a power is to grant leases in possession, a lease in futuro is void at law and in equity, even though it commences only a day after the date of the deed creating it (b). **2164.**

Lease in  
reversion.

In one sense, as opposed to a lease in possession, that is said to be a lease in reversion which commences at a future day. But in powers, the usual construction of the term lease in reversion as opposed to a lease in possession, is a lease to commence after the end of the present interest in being (c). Even though a power to lease be general, without expressing that the leases shall be in possession, leases in possession only are authorised (d). Under a power to make leases in reversion as well as in possession, the donee cannot make a lease in possession and another lease in reversion of the same land (e). And in the case of a lease of the reversion, there should not be an interval between the former lease and the lease of the reversion (f). **2165.**

### 4. *Duration of the Lease.*

Leases for  
terms of  
years.

The usual practice is to restrain tenants for life from making leases for a longer term than twenty-one years, except in those counties where lands are usually let for lives (g). Under a power to lease for a term not exceeding twenty-one years, a lease may be made for that period, determinable, at the option of the lessee, at the end of the first seven or fourteen years (h). **2166.**

(a) *Doe d. Earl of Egremont v. Stephens*, 6 Ad. & E. (N. S.) 208.

(b) 2 Sugd. Pow. 361, 363.

(c) 2 Sugd. Pow. 343—4; 4 Cruise T. 32, c. 15, § 21, 40.

(d) 2 Sugd. Pow. 345 ; 4 Cruise

T. 32, c. 15, § 24.

(e) 2 Sugd. Pow. 358.

(f) 2 Sugd. Pow. 359.

(g) 4 Cruise T. 32, c. 15, § 43.

(h) *Edwards v. Milbank*, 4 Drew.

606.

The usual power of leasing for lives authorises a lease for lives in esse, and for concurrent lives only (a). A power to make leases for two or more lives authorises a lease for a less number of lives, or for the same number of lives and the life of the survivor (b). **2167.**

PT.III. T.12,  
CH. 3, s. 7.

Leases for  
lives.

### 5. *The Reservation.*

The word "rent," in powers of leasing, may mean any return or equivalent adapted to the nature of the subject demised. So that, upon a lease of mines, a due proportion of the produce may be reserved as a rent (c). **2168.**

Meaning of  
word rent.

Where the usual or ancient rent is to be reserved, generally the usual way of reserving it must be followed. But where merely the best yearly rent is required to be reserved, it may be made payable quarterly or half-yearly. The word yearly in such powers denotes, not that the payment is to be made only once a year, but that it is to be made in each successive year (d). **2169.**

How ancient  
rent is re-  
served.

If "the best improved rents" or "the ancient accustomed rents" are reserved, the lease is void on account of the uncertainty as to the amount of the rent (e). **2170.**

Uncertainty  
in the reser-  
vation.

### 6. *Conditions and Covenants.*

By the stat. 32 Hen. 8, c. 34, grantees and assignees of reversions, their heirs, successors, executors, administrators and assigns may have the same benefit of conditions and covenants against the lessees, their executors, administrators and assigns, as the lessors or grantors themselves or their heirs and successors might have had. And the covenants entered into by a lessee with a tenant for life, the donee of the power, his heirs and assigns, will enure to the remainderman, who is considered to be an

Grantees  
and assign-  
ees of re-  
versions  
entitled to  
benefit of  
conditions  
and cove-  
nants.

Covenants  
entered into  
with a  
tenant for  
life enure to  
the remain-  
derman.

(a) 2 Sugd. Pow. 329, 340.

(b) 2 Sugd. Pow. 339, 341.

(c) 2 Sugd. Pow. 402.

(d) 2 Sugd. Pow. 403—406.

(e) 2 Sugd. Pow. 414, 415.

PT. III. T. 12,  
CH. 3, s. 7.

assignee within the meaning of that statute, as being an assignee of the *estate* out of which the lease was created (a). **2171.**

This statute only applies to contracts under seal (b). **2172.**

"Usual  
covenants."

Where a power of leasing provides that the lease shall contain all "usual and reasonable covenants," the general rule is to determine the question "what are usual covenants" by reference to the lease in existence at the date of the power (c). **2173.**

Where a power of leasing requires that the usual covenants shall be inserted in the lease, with a condition of re-entry "for non-performance of the covenants therein to be contained," and the lease contains a general covenant to repair and keep in repair, but, by the clause of re-entry, the right to re-enter is not, in general terms, in case the lessee shall not repair, but in case the lessee shall not repair "within six calendar months next after notice;" in such case the lease is not in compliance with the power (d). **2174.**

## II. *Relief against the defective Execution of Powers of Leasing.*

Equitable  
relief.

In some cases, where the forms prescribed by the power have not been observed, equity will relieve in favour of a lessee, if he is in the nature of a purchaser (e). **2175.**

Statutory  
relief.  
Leases in-

By the stat. 12 & 13 Vict. c. 26 (f), s. 2, "where, in the intended exercise of any such power of leasing as afore-

(a) 2 Sugd. Pow. 451—2.

(b) *Smith v. Eggington*, L. R. 9 C. P. 145.

(c) *Doe d. Earl of Egremont v. Stephens*, 6 Ad. & E. (N. S.) 208.

(d) *Doe d. Earl of Egremont v. Burrough*, 6 Ad. & E. (N. S.) 229.

(e) 2 Sugd. Pow. 138.

(f) By s. 1, "person" shall include corporations aggregate and sole, unless there be something in the context contrary to such construction.

said, whether derived under an Act of Parliament or under any instrument lawfully creating such power, a lease has been or shall hereafter be granted, which is, by reason of the non-observance or omission of some condition or restriction, or by reason of any other deviation from the terms of such power, invalid as against the person entitled, after the determination of the interest of the person granting such lease, to the reversion, or against other the person who, subject to any lease lawfully granted under such power, would have been entitled to the hereditaments comprised in such lease, such lease, in case the same have been made bonâ fide, and the lessee named therein, his heirs, executors, administrators, or assigns (as the case may require), have entered thereunder, shall be considered in equity as a contract for a grant, at the request of a lessee, his heirs, executors, administrators, or assigns (as the case may require), of a valid lease under such power, to the like purport and effect as such invalid lease as aforesaid, save so far as any variation may be necessary in order to comply with the terms of such power; and all persons who would have been bound by a lease lawfully granted under such power shall be bound in equity by such contract: Provided always, that no lessee under any such invalid lease as aforesaid, his heirs, executors, administrators, or assigns, shall be entitled by virtue of any such equitable contract as aforesaid to obtain any variation of such lease, where the persons who would have been bound by such contract are willing to confirm such lease without variation.”

**2176.**

Pr.III. T.12,  
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valid owing to deviation from terms of the power to be deemed contracts in equity for such leases as might have been granted under the power.

Proviso where the grantor or reversioner is willing to confirm.

By s. 3, “the acceptance of rent under any such invalid lease as aforesaid shall, as against the person so accepting the same, be deemed a confirmation of such lease.”

**2177.**

Acceptance of rent to be deemed a confirmation.

By s. 4, “where a lease granted in the intended

Leases

Pr.III. T.12,  
Ch. 3, s. 7.

invalid at  
the granting  
thereof may  
become  
valid if the  
grantor con-  
tinues in the  
ownership  
until the  
time when  
he might  
lawfully  
grant such a  
lease.

exercise of any such power of leasing as aforesaid is invalid by reason that at the time of the granting thereof the person granting the same could not lawfully grant such lease, but the estate of such person in the hereditaments comprised in such lease shall have continued after the time when such or the like lease might have been granted by him in the lawful exercise of such power, then and in every such case such lease shall take effect and be as valid as if the same had been granted at such last-mentioned time, and all the provisions herein contained shall apply to every such lease." 2178.

What shall  
be deemed  
an intended  
exercise of a  
power.

By s. 5, "when a valid power of leasing is vested in or may be exercised by a person granting a lease, and such lease (by reason of the determination of the estate or interest of such person or otherwise) cannot have effect and continuance according to the terms thereof, independently of such power, such lease shall, for the purposes of this Act, be deemed to be granted in the intended exercise of such power, although such power be not referred to in such lease." 2179.

Saving of  
the rights of  
the lessees  
under cove-  
nants for  
title and for  
quiet enjoy-  
ment, and  
the lessor's  
right of re-  
entry for  
breach of  
covenant,  
etc.

By s. 6, "nothing in this Act contained shall extend or be construed to prejudice or take away any right of action or other right or remedy to which, but for the passing of this Act, the lessee named in any such lease as aforesaid, his heirs, executors, administrators, or assigns, would or might have been entitled, under or by virtue of any covenant for title or quiet enjoyment contained in such lease on the part of the person granting the same, or to prejudice or take away any right of re-entry or other right or remedy to which, but for the passing of this Act, the person granting such lease, his heirs, executors, administrators, or assigns, or other the person for the time being entitled to the reversion expectant on the determination of such lease, would or might have been entitled, for or by reason of any breach of the covenants,

conditions, or provisoes contained in such lease, and on the part of the lessee, his heirs, executors, administrators, or assigns, to be observed and performed." **2180.**

Pr. III. T. 12,  
Ch. 3, s. 7.

By s. 7, "this Act shall not extend to any lease by an ecclesiastical corporation or spiritual person, or to any lease of the possessions of any college, hospital, or charitable foundation, or to any lease where, before the passing of this Act, the hereditaments comprised in such lease have been surrendered or relinquished, or recovered adversely, by reason of the invalidity thereof, or there has been any judgment or decree in any action or suit concerning the validity of such lease," etc. **2181.**

Act not to  
extend to  
certain  
leases.

By the stat. 12 & 13 Vict. c. 110, the operation of this Act was suspended till the 1st of June, 1850. And by the stat. 13 Vict. c. 17, the 3rd section of the 12 & 13 Vict. c. 26 was repealed. And by s. 2, "where, upon or before the acceptance of rent under any such invalid lease, as in the said first-recited Act mentioned, any receipt, memorandum, or note in writing, confirming such lease, is signed by the person accepting such rent, or some other person by him thereunto lawfully authorised, such acceptance shall, as against the person so accepting such rent, be deemed a confirmation of such lease." **2182.**

Where there  
is a note in  
writing  
showing  
intent to  
confirm,  
acceptance  
of rent to be  
deemed a  
confirma-  
tion.

By s. 3, "where during the continuance of the possession taken under such invalid lease, as in the said first-recited Act mentioned, the person for the time being entitled (subject to such possession as aforesaid) to the hereditaments comprised in such lease, or to the possession or the receipt of the rents and profits thereof, is able to confirm such lease without variation, the lessee, his heirs, executors, or administrators (as the case may require), or any person who would have been bound by the lease if the same had been valid, shall, upon the request of the person so able to confirm the same, be bound to accept a confirmation accordingly; and such confirmation may be by memo-

Where  
reversioner  
is able and  
willing to  
confirm,  
lessee to  
accept con-  
firmation.

PT. III. T. 12,  
CH. 3, s. 7.

randum or note in writing, signed by the person confirming and accepting respectively, or by some other persons by them respectively thereunto lawfully authorised; and, after confirmation and acceptance of confirmation, such lease shall be valid, and shall be deemed to have had from the granting thereof the same effect as if the same had been originally valid." 2183.

### SECTION VIII.

#### *Of Assurances under the Act for the Abolition of Fines and Recoveries (a).*

##### *I. Assurances by Persons liable after the 31st of December, 1833, to levy a Fine or suffer a Recovery.*

PT. III. T. 12,  
CH. 3, s. 8.

By the stat. 3 & 4 Will. 4, c. 74, s. 3, persons liable after the 31st December, 1833, to levy fines or recoveries, or to procure the same to be levied or suffered, shall effect such of the intended purposes as can be so effected, by a disposition under the Act, and such of them as cannot be so effected, by a deed which shall purport to be intended to have, and which shall accordingly have, the same operation as a fine or recovery. 2184.

##### *II. Disposition of Freehold Lands by Tenants in Tail, Issue in Tail, and Persons entitled to Base Fees in general.*

Enabling  
clause,  
giving  
power of  
disposing  
of entailed  
land.

By the stat. 3 & 4 Will. 4, c. 74, s. 15, "after the 31st day of December, 1833, every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, may dispose of for an estate in fee simple absolute, or for any less estate, the lands entailed, as against all

(a) This Act being so lengthy, and being in the possession of every practitioner in some form, is not

given verbatim in this edition, but in the way of an abridgment.



persons claiming the lands entailed by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous Act would have been vested in or might have been claimed by, the person making the disposition, at the time of his making the same, and also as against all persons whose estates are to take effect after the determination or in defeasance of any such estate tail." 2185.

Pr. III. T. 12,  
Ch. 3, s. 8.

But, 1. By s. 16, this power of disposition as to lands of which a woman is tenant in tail within the stat. 11 Hen. 7, c. 20, under a settlement prior to the stat. 3 & 4 Will. 4, c. 74, cannot be exercised by her, except with such assent as, if this Act had not been passed, would, under the provisions of the Act of Hen. 7, have rendered valid a fine or common recovery levied or suffered by her of such lands. 2. By s. 18, the power of disposition does not extend to tenants of estates tail who by any Act are restrained from barring their estates tail, or to tenants in tail after possibility of issue extinct. 3. By s. 20, a person cannot dispose of any lands entailed in respect of any expectant interest which he may have as issue inheritable to any estate tail therein. 2186.

Exception  
in the case  
of a tenant  
in tail ex  
provisiōe  
viri.

Exception  
in the case  
of tenants in  
tail re-  
strained  
from barring  
their estates  
tail, and  
tenants in  
tail after  
possibility  
of issue  
extinct.  
Expectan-  
cies of issue  
in tail.

By s. 19, after the 31st day of December, 1833, where an estate tail in any lands is barred and converted into a base fee, the person who would otherwise have been actual tenant in tail of the same lands, shall have full power to dispose of such lands, as against all persons whose estates are to take effect after the determination or in defeasance of the base fee, so as to enlarge the base fee into a fee simple absolute. 2187.

Enabling  
clause  
giving  
power to  
enlarge base  
fees.

By s. 21, if a tenant in tail of lands makes a disposition of the same under this Act, by way of mortgage, or for any other limited purpose, such disposition is to the extent of the estate thereby created, an absolute bar to

Disposition  
by a tenant  
in tail for a  
limited  
purpose.

PT. III. T. 12,  
CH. 3, s. 8.

all persons as against whom such disposition is by this Act authorised to be made. **2188.**

Protector  
where none  
is appointed.  
General  
rule.

By s. 22, if at the time when there is a tenant in tail of lands under a settlement, there is subsisting, in the same lands under the same settlement, any estate for years determinable on the dropping of a life or lives, or any greater estate (not being an estate for years), prior to the estate tail, the owner of such prior estate, or the first of such prior estates, if more than one, then subsisting under the same settlement, or who would have been so if no absolute disposition thereof had been made, shall be the protector of the settlement (a), although the same may have been charged or incumbered or absolutely disposed of; and an estate by the curtesy, in respect of the estate tail, or of any prior estate created by the same settlement, is to be deemed a prior estate under the same settlement within the meaning; and an estate by way of resulting use or trust to or for the settlor is deemed an estate under the same settlement. **2189.**

Protector in  
the case of  
part owners.

By s. 23, where two or more persons are owners of a prior estate, each is the sole protector to the extent of his undivided share. **2190.**

Protector in  
the case of  
a married  
woman.

By s. 24, where a married woman would, if single, be the protector of a settlement, she and her husband together are the protector of such settlement; but if such prior estate has by such settlement been settled, or agreed or directed to be settled, to her separate use, she alone is protector of such settlement. **2191.**

Persons who  
are not to be  
protectors.

By ss. 27, 31, no woman, in respect of her dower, and (except in the case of a bare trustee under a settlement made on or before the 31st day of December, 1833, who would have been the proper person to make a tenant to the writ for suffering a common recovery to bar an estate tail), no bare trustee, heir, executor, administrator, or

(a) See *In re Dudson's Contract*, L. R. 8 Ch. D. (Ap.) 628.

assign, is the protector. And by s. 28, where under any settlement there is more than one estate prior to an estate tail, and the owner of any prior estate is excluded from being the protector, the person (if any) who, if such estate did not exist, would be the protector, shall be such protector. **2192.**

Pr. III. T. 12,  
Ch. 3, s. 8.

By s. 29, where on or before the 31st day of December, 1833, an estate under a settlement has been disposed of, the person who in respect of such estate would have been the proper person to have made the tenant to the writ of entry or other writ for suffering a common recovery of the lands entailed by such settlement, is the protector. And by s. 30, where any person who, on or before the 31st day of December, 1833, disposed of a remainder or reversion in fee in any lands, or created any estate out of such remainder or reversion, would otherwise have been the protector, and thereby be enabled to concur in the barring of such remainder or reversion, the person who would have been the proper person to have made the tenant to the writ of entry or other writ for suffering a common recovery of such land, is the protector. **2193.**

Protector in  
the case of  
an estate  
disposed of  
or created  
out of a  
remainder  
or reversion  
before  
December  
31st, 1833.

Section 32 gives power to any settlor to appoint any person or persons the protector and to perpetuate the protectorship. The number of persons to compose the protector is not to exceed three. Every deed whereby a protector is appointed or relinquishes his office, is to be void, unless inrolled in Chancery within six months. On the death of one of two or more protectors, the office of protector survives to the other or others (a). **2194.**

Power to  
appoint  
protector.

By s. 33, if any person, protector of a settlement, is lunatic, idiot, or of unsound mind, whether found such by inquisition or not, the Lord Chancellor or other the person or persons for the time being intrusted by the King's sign manual with the care and commitment of the

Where the  
Lord Chau-  
cellor or the  
Court is  
to be the  
protector.

(a) *Bell v. Holtby*, L. R. 15 Eq. 178.

PT. III. T. 12,  
CH. 3, s. 8.

custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, is or are the protector in lieu of the person who is such lunatic or idiot, or of unsound mind; or if any person, protector of a settlement, is convicted of treason or felony, or if any person, not being the owner of a prior estate under a settlement, is protector and is an infant, or if it is uncertain whether such last-mentioned person is living or dead, then the Court becomes the protector in lieu of such person; or if any settlor declares that the person who would otherwise be entitled to be protector shall not be such protector and does not appoint any person to be protector in his stead, then the Court becomes the protector; or if in any other case where there is subsisting a prior estate sufficient to qualify the owner thereof to be protector, there happens at any time to be no protector, then the Court, while there is no such protector, and the prior estate is subsisting, is the protector. **2195.**

How far  
protector's  
consent is  
required.

By ss. 34 and 35, where there is a protector, his consent is to be requisite to enable an actual tenant in tail to create a larger estate than a base fee, or to enable a person to exercise the statutory power of disposition in the case of a base fee. **2196.**

Protector to  
have abso-  
lute discre-  
tion.

By s. 36, the protector is to be subject to no control or liability in the exercise of his power of consenting. **2197.**

Confirma-  
tion of a  
voidable  
estate by a  
subsequent  
disposition.

By s. 38, a voidable estate by a tenant in tail in favour of a purchaser is confirmed by a subsequent disposition of such tenant in tail under the Act, but not against a purchaser without notice. **2198.**

Enlarge-  
ment of a  
base fee by  
union with  
the remain-  
der or rever-  
sion.

By s. 39, base fees, when united with the immediate reversions, are enlarged, instead of being merged. **2199.**

Mode of  
assurance  
by a tenant  
in tail.

By s. 40, a disposition by a tenant in tail is to be effected by any description of deed used to pass the legal fee, but not by a will or by a contract. If the tenant in tail is a married woman, the disposition must be with the

concurrence of her husband, and must be acknowledged by her. **2200.**

Pt. III. T. 12,  
CH. 3, s. 8.

A deed which is inoperative to convey by reason of the subsequent disclaimer of the grantees, will also be inoperative as a mere disentailing deed (a). **2201.**

By s. 41, no assurance by a tenant in tail, except a lease for not more than twenty-one years at not less than five-sixths of a rack rent, shall have any operation under the Act, unless inrolled in Chancery within six calendar months. **2202.**

Inrolment  
thereof.

By s. 74, every deed required to be inrolled shall, when inrolled, take effect in the same manner as it would have done if the inrolment thereof had not been required except that every such deed shall be void against any person claiming the lands or money thereby disposed of for valuable consideration, under any subsequent deed. **2203.**

Commence-  
ment of  
operation of  
an inrolled  
deed.

By s. 42, the consent of the protector must be given by the same assurance, or by a prior or contemporaneous deed. And by s. 43, if by a distinct deed, it is to be considered an unqualified consent, unless he confines it to a particular disposition. And, in that case, by s. 46, it must be inrolled in Chancery, with or before such assurance. **2204.**

Protector's  
consent,  
how given.

Consent by  
a distinct  
deed, how  
construed.

Inrolment of  
consent by a  
distinct  
deed.

By s. 44, the consent of a protector cannot be revoked. **2205.**

Consent not  
revocable.

By s. 45, any married woman, being protector, may, under this Act, in the same manner as if she were a femme sole, give her consent to the disposition of a tenant in tail. **2206.**

Consent of a  
married  
woman as  
protector.

By s. 47, Courts of Equity are excluded from giving any effect to dispositions by tenants in tail or consents of protectors of settlements which in Courts of Law would not be effectual. **2207.**

Exclusion of  
the aid of a  
Court of  
Equity.

By ss. 48 and 49, the Lord Chancellor or the Court, **Consent of**

(a) *Peacock v. Eastland*, L. R. 10 Eq. 17.

PT. III. T. 12,  
CH. 3, s. 8.

the Lord  
Chancellor  
or Court.

while protector of a settlement, has the same power to consent, and to make such orders as shall be thought necessary, which are evidence of such consent; and if any other person is joint protector, the disposition is not valid without his consent. **2208.**

### III. *Dispositions by Tenants in Tail and Owners of Base Fees in Copyholds.*

Previous  
clauses to  
apply to  
copyholds,  
except, etc.

By s. 50, all the previous clauses in this Act, so far as circumstances and the different tenures admit, apply to lands held by copy of court roll, except that a disposition by a tenant in tail whose estate is an estate at law, must be made by surrender, and except that a disposition by a tenant in tail whose estate is merely an estate in equity, may be made either by surrender or by a deed, and except so far as such clauses are otherwise altered or varied by the clauses which follow. **2209.**

Protector's  
consent by  
deed.

But by s. 51 it is provided, that, if the consent of the protector to the disposition of lands held by copy of court roll is given by deed, such deed, either at or before the time of the surrender, shall be executed by the protector and produced to the lord of the manor, or to his steward, or to the deputy steward; and, on the production of the deed, the lord, or steward, or deputy steward, must, by writing under his hand indorsed on the deed, acknowledge that the same was produced within the time limited, and must cause such deed, with the indorsement thereon, to be entered on the court rolls of the manor; and after such deed shall have been so entered, the lord of the manor, or his steward, or the deputy steward, must indorse thereon a memorandum signed by him, testifying the entry of the same on the court rolls. **2210.**

Protector's  
consent  
when not by  
deed.

By s. 52, if the consent of the protector to the disposition of lands held by copy of court roll is not given by deed,

the consent must be given by the protector to the person Pt. III. T. 12,  
Ch. 3, s. 8. taking the surrender by which the disposition is effected; and if the surrender is made out of court, it must be expressly stated in the memorandum of such surrender that such consent has been given, and such memorandum must be signed by the protector; and the lord of the manor of which the lands are parcel, or his steward, or the deputy steward, must cause the memorandum, with such statement therein as to the consent, to be entered on the court rolls of the manor; but if the surrender is made in court, the lord of the manor, or his steward, or the deputy steward, must cause an entry of such surrender, containing a statement that such consent had been given, to be made on the court rolls. 2211.

By s. 53, a tenant in tail of lands held by copy of court roll, whose estate is merely an estate in equity, may by deed dispose of such lands in the same manner as he could have done if they had been of freehold tenure; and all the previous clauses in this Act, so far as circumstances admit, apply to the lands in respect of which he avails himself of this power of disposition; and the deed by which it is effected must be entered on the court rolls of the manor; and if there is a protector to consent to the disposition, and such protector gives his consent by a distinct deed, the consent is void unless the deed of consent is executed by the protector either on or at any time before the day on which the deed of disposition is executed by the equitable tenant in tail; and such deed of consent must be entered on the court rolls; and it is imperative on the lord of the manor or his steward, or the deputy steward, when required so to do, to enter such deed or deeds on the court rolls, and he must indorse on each deed so entered a memorandum signed by him, testifying the entry of the same on the court rolls; a deed by which lands held by copy of court roll shall be disposed of under this clause, by an equitable Equitable  
estates tail  
in copy-  
holds.

PT. III. T. 12,  
CH. 3, s. 8.

tenant in tail, is void against any person claiming such lands for valuable consideration under any subsequent assurance duly entered on the court rolls, unless the deed of disposition by the equitable tenant in tail be entered on the court rolls of such manor before the subsequent assurance is entered. **2212.**

Inrolment,  
except on  
court rolls,  
not neces-  
sary.

By s. 54, the surrender or the memorandum, or a copy thereof, or the deed of disposition, or the deed of consent to the disposition, need not be inrolled otherwise than by entry on the court rolls. **2213.**

A disentailing deed of copyholds must be entered on the court rolls within six months after the execution thereof: otherwise it will have no operation under this Act (a). **2214.**

#### IV. *Disposition of Lands of which Bankrupts are Tenants in Tail, or in which they have Base Fees.*

Power of  
com-  
missioner  
to dispose  
of entailed  
lands.

By s. 56, the commissioner, in the case of an actual tenant in tail becoming bankrupt after the 31st of December, 1833, may by deed dispose of the lands of the bankrupt to a purchaser, and without the protector's consent, for as large an estate as the actual tenant in tail, if not a bankrupt, could have created without such consent. **2215.**

Power of  
com-  
missioner  
to dispose of  
land  
wherein  
the bank-  
rupt has a  
base fee.

By s. 57, the commissioner, in the case of a tenant in tail entitled to a base fee becoming bankrupt, and of there being no protector, may by deed dispose of the lands of the tenant in tail to a purchaser for as large an estate as such tenant in tail could have created, if not a bankrupt. **2216.**

Protector's  
consent.

By s. 58, the commissioner stands in the place of the actual tenant in tail or tenant in tail entitled to a base fee, so far as regards the consent of such protector. **2217.**

Inrolment  
of deed of  
disposition  
and consent.

By s. 59, a deed of disposition of freeholds by a commissioner must be inrolled in Chancery within six months; and a deed of disposition of copyholds by him must be

(a) *Honywood v. Forster* (No. 1), 30 Beav. 1.



entered on the court rolls, and the consent to a disposition of such copyholds, if by a distinct deed, must be executed on or before the deed of disposition, and must be entered on the court rolls, and a memorandum by the steward or deputy steward testifying the entry of such deeds on the court rolls must be indorsed thereon. **2218.**

Pr. III. T. 12,  
Ch. 3, s. 8.

By s. 60, where the disposition of a commissioner only creates a base fee, in consequence of the protector not giving his consent, then such base fee will be enlarged as soon as there ceases to be a protector, and, by s. 61, even subsequent to the sale or conveyance of the lands under the bankrupt laws. **2219.**

Enlargement of base fees on the event of there being no protector.

By s. 62, a voidable estate created in favour of a purchaser by an actual tenant in tail becoming a bankrupt, or by a tenant in tail entitled to a base fee becoming a bankrupt, is confirmed to the full extent as against all persons, except those whose rights are saved by the Act, by the disposition of the commissioner, if there is no protector, or if the protector consents, or if there ceases to be a protector, or confirmed so far as such actual tenant in tail, if not a bankrupt, could have confirmed the voidable estate without such consent, if the protector does not consent; but not in any of these cases, against a purchaser without express notice of the voidable estate. **2220.**

Confirmation of voidable estates by a subsequent disposition.

All acts and deeds by a bankrupt tenant in tail of lands, which affect such lands, and which, if he had been seised of or entitled to such lands in fee simple absolute, would have been void against his assignees, and all persons claiming under them, are void against any disposition which may be made of such lands under this Act by the commissioner (s. 63). **2221.**

Acts of a bankrupt in regard to his estate tail void against a disposition by the commissioner.

Subject to the powers given to the commissioner and to the estate in the assignees, a bankrupt tenant in tail retains his powers of disposition (s. 64). **2222.**

Power reserved to the bankrupt himself by the statute.

The disposition by the commissioner of the lands of a

Disposition

Pr. III. T. 12  
CH. 8, s.

after the  
bankrupt's  
decease.

bankrupt tenant in tail or a tenant in tail entitled to a base fee, will, if the bankrupt be dead, have the same operation as if he were alive, in case at the time of the bankrupt's decease there is no protector of the settlement, or in case the bankrupt was an actual tenant in tail, and there was, at the time of the disposition, any issue inheritable to the estate tail, or in case the bankrupt was a tenant in tail entitled to a base fee, and there was, at the time of the disposition, any issue who, if the base fee had not been created, would have been actual tenant in tail, and either no protector, or a protector who consented to the disposition (s. 65). **2223.**

Disposition  
of copyholds  
to operate as  
a surrender.

By s. 66, every disposition of copyholds by a commissioner of bankrupts, where the estate shall not be equitable, will have the same operation as a surrender. **2224.**

Rents, cove-  
nants, and  
conditions.

By s. 67, the mesne rents and profits of the lands of a bankrupt, of which a commissioner has power to make disposition, shall be received and recoverable by the assignees; and they may enforce covenants, conditions, and agreements. **2225.**

#### *V. Dispositions in the case of Money subject to be invested in Land which is to be entailed.*

By s. 71, the previous clauses apply to lands to be sold, where the purchase money is subject to be invested in the purchase of lands to be entailed, and to money subject to be invested in like manner. **2226.**

#### *VI. Dispositions by Married Women.*

Power of  
disposition  
conferred by  
the Act.

By s. 77, a married woman, not being tenant in tail, may, with her husband's concurrence, by deed acknowledged, dispose of lands, and money subject to be invested in the purchase of lands, and of any estate therein, and may release and extinguish powers, as a femme sole, except in the case of copyholds, where any of the objects to be

effected could have been effected by her by surrender (a). Pr. III. T. 12, CH. 3, s. 8.  
**2227.**

By s. 79, every deed to be executed by a married woman for any of the purposes of this Act, except such as may be executed by her in the character of protector, must upon her executing the same, or afterwards, be produced and acknowledged by her as her act and deed before a judge of one of the Superior Courts, or a Master in Chancery, or before [two perpetual commissioners, or special commissioners (b), which number is now reduced to one by stat. 45 & 46 Vict. c. 39, s. 7 (Appendix).] **2228.**

By s. 80, the femme covert is required to be separately examined as to her consent. By s. 81, provisions are made as to the appointment and lists of perpetual commissioners. By s. 82, it is provided that their power is not to be confined to any particular place. By s. 83, provision is made for the appointment of special commissioners in certain cases. By s. 84, a memorandum and certificate of acknowledgment are required. By s. 85, the certificate, with an affidavit verifying the same, is required to be filed. And by ss. 87 and 88, provisions are made as to an index and copies of certificates, and by s. 89, as to the power of the Court of Common Pleas to make orders, etc. And by the stat. 17 & 18 Vict. c. 75, s. 1, deeds acknowledged shall not be impeached by reason only of the party taking the acknowledgment being interested. But by s. 3, the Court of Common Pleas may make rules to prevent interested persons from taking acknowledgments. [By stat. 45 & 46 Vict. c. 39, s. 7 (Appendix), part of section 84, and the sections 85 to 88 inclusive, of stat. 3 & 4 Will. 4, c. 74, and also the stat. 17 & 18 Vict. c. 75, are

(a) See *Crofts v. Middleton*, 8 D. M. & G. 192.

(b) In *Goodchild v. Dougal*, L. R. 3 Ch. D. 650, *Jessel*, M. R., held that acknowledgment is not neces-

sary, where the concurrence of the husband has been dispensed with by an order of the Court of Common Pleas.

Acknowledgment of disposition.

Forms to be observed.

Pr. III. T. 12,  
Ch. 3, s. 8.

repealed, and other provisions similar to those repealed, are enacted, the Supreme Court of Judicature being substituted for the Court of Common Pleas.] **2229.**

Relation  
of deed.

By the stat. 3 & 4 Will. 4, c. 74, s. 86, when the certificate of the acknowledgment of a deed by a married woman is so filed of record, the deed so acknowledged will, so far as regards the disposition, release, surrender, or extinguishment thereby made by any married woman whose acknowledgment is so certified, take effect from the time of its being acknowledged, and the subsequent filing of such certificate will have relation to such acknowledgment. **2230.**

Equitable  
interests in  
copyholds.

By s. 90, a married woman must be separately examined on the surrender of her equitable estate in copyholds, as if such estate were legal ; and every such surrender, whether made before or after the passing of the Act, is valid. **2231.**

Dispensa-  
tion with  
the hus-  
band's con-  
currence in  
certain  
cases.

By s. 91, if a husband, in consequence of being a lunatic, idiot, or of unsound mind, or from any other cause, is incapable of executing a deed, or of making a surrender of lands held by a copy of court roll, or if his residence is not known, or he is in prison, or he is living apart from his wife, the Court may dispense with the concurrence of the husband, unless the Lord Chancellor, or other the person or persons intrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, is the protector of a settlement, in lieu of her husband. **2232.**

[Stat. 45 & 46 Vict. c. 75 (Appendix), renders acknowledgment unnecessary with respect to property to which it applies ; but in other cases, the provisions of stat. 3 & 4 Will. 4, c. 74, as altered by recent Acts, must still be regarded in effectuating dispositions by married women.] **2232a.**

SECTION IX.

*Of Concise Conveyances and Leases under the Stats. 8 & 9 Vict. cc. 119, 124, and the Stat. 25 & 26 Vict. c. 53. [Also Statutory Mortgages, and short Forms of Deeds under the Stat. 44 & 45 Vict. c. 41.]*

In the stat. 8 & 9 Vict. c. 119, intituled "An Act to facilitate the Conveyance of Real Property," and com-  
PT.III. T. 12  
CH. 3, s. 9.  
 mencing on the 1st October, 1845, a form of the com-  
Stat. 8 & 9  
Vict. c. 119,  
as to concise  
convey-  
ances  
 mencement and the operative part and conclusion of a  
 deed is given in the first schedule. And in the second  
 schedule there are two columns, the first of which con-  
 sists of some very short forms of words, expressive of the  
 substance of certain longer forms contained in the second  
 column, which are of the length and character usually  
 employed in deeds. [And the Act made provisions  
 regulating the employment of the forms contained in the  
 schedule. But that Act is now repealed by stat. 44 & 45  
 Vict. c. 41 (Appendix).] **2233.**

By the stat. 8 & 9 Vict. c. 124, intituled "An Act to facilitate the Granting of certain Leases," provisions are  
Stat. 8 & 9  
Vict. c. 124,  
as to concise  
leases.  
 made for facilitating the granting of leases of houses,  
 similar to the provisions of the stat. 8 & 9 Vict. c. 119  
 for facilitating the conveyance of property. **2234.**

By the stat. 25 & 26 Vict. c. 53 (the Land Registry Act), land registered under that Act, may, as we have  
Stat. 25 & 26  
Vict. c. 53.  
 seen (a), be dealt with or affected, 1st, by a statutory  
 disposition in a scheduled form ; 2ndly, by an indorsement  
 on an instrument called the land certificate. **2235.**

[The stat. 44 & 45 Vict. c. 41 (Appendix), contains in  
Stat. 44 & 45  
Vict. c. 41.  
 the third schedule forms of deeds of statutory mortgage,  
 statutory transfer, and statutory reconveyance of mort-  
 gage. And by ss. 26—29 of the Act, various provisions

(a) Supra, par. 1507—1513.

PT. III. T. 12,  
CH. 3, s. 9. are made respecting the forms in the third schedule. The  
— Act also contains in the fourth schedule, short forms of the following deeds:—I. Mortgage; II. Further Charge; III. Conveyance on Sale; and IV. Marriage Settlement. And it provides by s. 57, that deeds in the form, or in the like form, and using the expressions, or expressions to the like effect, as contained in the fourth schedule, shall be sufficient. Also by s. 56, protection is afforded to solicitors and trustees adopting the Act.] **2235a.**

## CHAPTER IV.

OF THE DIFFERENT KINDS OF DEEDS OTHER THAN  
CONVEYANCES.

THERE are, as already observed, some other deeds which PART III.  
T. 12, CH. 4. are not properly termed conveyances. Such are, 1. Deeds of covenant or agreement. 2. Bonds. 3. Declarations of trust. 4. Deeds of appointment of trustees, receivers, stewards, guardians, attorneys, and others standing in a confidential relation. **2236.**

The points connected with deeds of covenant or agreement and deeds of appointment of trustees, etc., so far as they fall within the scope of this work, will be found under other heads. But some observations may be made in this place on bonds and declarations of trust. **2237.**

## SECTION I.

*Of Bonds.*I. *Bonds generally.*

A bond or obligation is a deed poll, whereby the obligor binds or obliges himself alone, or himself and his heirs, or himself, his heirs, executors, and administrators, to pay a sum of money or to do some other thing at a particular time (a). **2238.**

Bonds are of two kinds: simple or single, that is, without any defeasance or condition in or annexed to them; and double or conditional, that is, accompanied with a

PART III. T. 12,  
CH. 4, § 1.  
Definition.

Bonds are  
either sim-  
ple or single,  
or double or  
conditional.

(a) See 2 Pres. Shep. T. 367, 369, 376; 4 Cruise T. 32, c. 8, § 1; 2 Bl. Com. 340.

PT. III. T. 12,  
CH. 4, s. 1.

condition (*a*), that, if the obligor does some act, [then the obligation shall be void, but otherwise shall remain in full force. The act may be the] payment of rent, performance of covenants in a certain deed, or repayment of a principal sum of money borrowed of the obligee with interest. Where the obligation is intended to secure the repayment of a sum of money mentioned in the condition, the penal sum mentioned in the obligation is usually double the sum mentioned in the condition, the payment of which is so secured (*b*). **2239.**

Requisites  
to a bond.

There are only three things essentially necessary to a bond, namely, writing, sealing, and delivery. For, as to signing, that was clearly not necessary in former times, and the Statute of Frauds does not extend to bonds; for no estate or interest in lands is immediately created by them (*c*). And no particular form of words is required to constitute a bond (*d*). **2240.**

Who are  
bound.

Executors and administrators will be bound by an obligation, although they be not named; but the heir of the obligor will not be bound by the obligation, unless he is named (*e*). An exception to this, however, is created by the 27th section of the stat. 33 Hen. 8, c. 39, by which it is enacted, that the King shall not be excluded from demanding his just debts against any of his subjects, as heir or heirs to any person or persons indebted to the King or to any other persons to his use, albeit the word heir be not comprised in such recognizance, obligation, or specialty (*f*). **2241.**

Who may  
take advantage of a  
bond.

If an obligation is made to one and his heirs, the executors and administrators, and not the heir, shall take advantage of it; for the heirs do not represent the obligee as to such a matter (*g*). **2242.**

(*a*) 2 Pres. Shep. T. 367.

(*b*) 4 Cruise T. 32, c. 8, § 1.

(*c*) 4 Cruise T. 32, c. 8, § 2.

(*d*) 4 Cruise T. 32, c. 8, § 3; 2

Pres. Shep. T. 367.

(*e*) 2 Pres. Shep. T. 369, 376.

(*f*) 4 Cruise T. 32, c. 8, § 17.

(*g*) 2 Pres. Shep. T. 376.



Where there are two or more obligors, a bond may be either joint only or joint and several. If two or more bind themselves simpliciter, without any words expressive of severalty or individuality, the obligation is joint only, and not several. But even if the obligation is several, the obligee may sue all the obligors together, or all of them apart, at his pleasure; and yet it seems that unless the obligation is special for this purpose, he may not sue some of them, and spare the rest, but he must sue them all. Although he may have several judgments and several executions against the obligors, yet he shall have satisfaction but once, or from one of them only; for, after he has been satisfied by one, the rest shall be discharged. But where the obligation is joint and not several, the obligee must sue all the obligors together, except in some special cases; as where one of the obligors alone seals the deed, or where all of them seal, but one of them is an infant, a married woman, a monk, or the like, or where one of them is dead (a). **2243.**

PT.III. T.12,  
CH. 4, s. 1.

Joint and  
several, or  
joint only.

A single obligation is always taken most in advantage of the obligee and against the obligor. But the condition of an obligation is always taken most in advantage of the obligor and against the obligee, because it is introduced for the benefit of the obligor (b). **2244.**

Construc-  
tion of  
bonds and  
conditions  
annexed  
thereto.

## II. *The Condition of a Bond.*

If these words are omitted in the close of the condition "that then the obligation shall be void," the condition is void (c). **2245.**

Omission of  
concluding  
words.

The condition of an obligation may be either in the same or in another deed; and, if in the same deed, it may be indorsed on the back of the obligation, subscribed under it, or contained within it (d). **2246.**

How the  
condition  
may be an-  
nexed.

(a) 2 Pres. Shep. T. 375.

(b) 2 Pres. Shep. T. 375.

(c) 2 Pres. Shep. T. 371.

(d) 2 Pres. Shep. T. 370.

Pr.III. T.12,  
CH. 4, s. 1.

What may  
be the con-  
dition.

Condition  
malum in  
se.

Condition  
against the  
municipal  
law, or re-  
pugnant.

Condition  
insensible  
and uncer-  
tain.

Impossible  
condition.

The condition of an obligation may be to do any lawful and possible thing (a). **2247.**

When the object sought to be accomplished by the condition is malum in se, that is, contrary to the moral law, there, not only the condition, but the whole obligation also is void, ab initio (b). **2248.**

But when the object is only against some maxim of law, or is but malum prohibitum only, or is repugnant to the estate, the condition only is void, and the obligation remains single and without a condition (c). **2249.**

When the condition of an obligation is insensible and uncertain, so that the meaning cannot be known, or is repugnant to the obligation, the condition only is void, and the obligation good (d). **2250.**

When the thing which is required to be done by the condition is in its nature impossible to be done at the time of the making of the obligation, there the obligation is good, and the condition only is void. But when it is a thing possible at the time of making the obligation, and afterwards, by matter ex post facto, by the act of God, the act of the law, or the act of the obligee, it becomes impossible, the obligation and the condition both become void (e). When the condition of an obligation is to do one of two things by a given day, and at the time of making the obligation both of them are possible, but afterwards one of the things becomes impossible by the act of God, or by the sole act or laches of the obligee himself, the obligor is discharged of the whole obligation. But if one of the things becomes impossible afterwards by the act of the obligor or a stranger, the obligor must do the other thing. And if, at the time of

(a) 2 Pres. Shep. T. 371.

(b) 2 Pres. Shep. T. 371; 2 Bl. Com. 340; Co. Litt. 206 b.

(c) 2 Pres. Shep. T. 372; 2 Bl. Com. 340; Co. Litt. 206 b.

(d) 2 Pres. Shep. T. 373; 2 Bl. Com. 340.

(e) 2 Pres. Shep. T. 372, 382, 393; 2 Bl. Com. 340; Co. Litt. 206 a.

the making of the obligation, one of the things is, and the other of the things is not, possible to be done, he must perform that which is possible (*a*). **2251.**

On breach of the condition of a bond, the penalty then becomes the legal debt. And no relief was given against it by the common law. But in equity, where the bond is for the payment of money, the obligee can only recover his principal, interest, and costs. And, by the stat. 4 Anne c. 16, s. 12, payment of the principal, interest, and costs, is good at law. And where the bond is for the performance of any other act, for the non-performance of which compensation may be made in damages, the obligee is in equity only allowed those damages (*b*). When the condition of a bond is not performed, and it thereby becomes absolute, it is a charge on the personal estate, including the chattels real of the obligor. And on the death of the obligor, it charges his heir, whether named or not, who, if there is a deficiency of personal assets, is bound to discharge it, so far as he has assets by descent (*c*). But the bond itself, without a judgment, is not an immediate or a direct charge upon the real estate of the obligor; and therefore any settlement or disposition which he makes in his lifetime of his freehold estates, whether voluntary or not, will be good against bond creditors, except so far as they may be protected by the stat. 13 Eliz. c. 5 (*d*). [Now, however, in consequence of recent legislation, a bond, made after the 31st of December, 1881, though not expressed to bind the heirs, operates in law to bind the heirs and real estate, as well as the executors and administrators and personal estate of the obligor (*e*).] **2252.**

(*a*) 2 Pres. Shep. T. 382, 393.

(*b*) 4 Cruise T. 32, c. 8, § 13; 2 Bl. Com. 341; Story's Eq. Jur. § 1814.

(*c*) 2 Bl. Com. 340; 4 Cruise T.

32, c. 8, § 8; and see supra, par. 1814 a.

(*d*) 4 Cruise T. 32, c. 8, § 8, 10. See infra, T. 12, Ch. 6, s. 3, No. V.

(*e*) See supra, par. 1814a.

## SECTION II.

*Of Declarations of Trust.*

PR. III. T. 12,  
CH. 4, s. 2.

How trusts  
may be  
created and  
evidenced.

It is not necessary that uses or trusts should be created by writing, but it is necessary that uses or trusts of freehold, copyhold, or leasehold hereditaments be evidenced by writing. By the Statute of Frauds (29 Car. 2, c. 3), s. 7, it is enacted, "That all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect." But by s. 8 it is provided, "That where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made."

**2253.**

The beneficial owner of real estate purchased in the name of a trustee, may declare the trust thereof, as "the person who is by law enabled to declare such trust," within the meaning of the 7th section of the Statute of Frauds (a). **2254.**

Declarations of trust of money, even though secured on real estate, or of chattels personal, need not be created nor evidenced by writing (b). If a person declares himself to be a trustee for another of money or personal property to be recovered, whether in writing or by acts or declarations of a decisive and definite nature sufficiently proved, the

(a) *Tierney v. Wood*, 19 Beav. 330.

Eq. Jur. 497—8 ; 2 Spence's Eq.

(b) 4 Cruise T. 32, c. 12, § 2, 3 ;  
Story's Eq. Jur. § 972 ; 1 Spence's

Jur. 19, 20, 97; *Peckham v. Taylor*,  
31 Beav. 250.

transaction will be binding against him and his representatives (a); and if a person, by writing or by word, directs his debtor to hold the money due in trust for a third person, and such direction is communicated to the debtor and the donee, an effectual trust is created in favour of the donee (b). And if a person signs and hands over a memorandum of gift of a bond, without handing over the bond, that has been held to be a good declaration of trust (c). But a mere promise to give, without valuable consideration, or a defective conveyance, gift, or assignment, without valuable consideration, where the party means actually to vest the *legal* ownership in the donee, or in any other person as trustee for him, will not be considered as a declaration of trust (d). In order to give validity to a declaration of trust by a person, it is necessary that he should have absolutely parted with his interest in the property, and put it out of his own power, at least in intention. So that a delivery of a box, not containing a deed of gift, and of the key of which the party delivering it retains possession, will not amount to a declaration of trust of the contents (e). And it has been held that a memorandum expressive of an "intention to leave" and a "determination to appropriate" a fund to a person, and a declaration during a last illness of a wish that it should be given to such person, does not amount to a declaration of trust, but is a mere inoperative indication of a testamentary intent not carried into effect (f). 2255.

(a) 2 Spence's Eq. Jur. 897 ;  
*Dipple v. Corles*, 11 Hare 183 ;  
*Peckham v. Taylor*, 31 Beav. 250 ;  
*Grant v. Grant*, 34 Beav. 623.

(b) 2 Spence's Eq. Jur. 531, 898 ;  
*Paterson v. Murphy*, 11 Hare 88 ;  
*Vanderberg v. Palmer*, 4 K. & J. 204.

(c) *Morgan v. Malleson*, L. R. 10  
 Eq. 475.

(d) 2 Spence's Eq. Jur. 57, 886 ;  
*Dipple v. Corles*, 11 Hare 183 ;  
*Richards v. Delbridge*, L. R. 18 Eq.  
 11 ; *Moore v. Moore*, L. R. 18 Eq.  
 474.

(e) *Warriner v. Rogers*, L. R.  
 16 Eq. 340.

(f) *Re Glover*, 2 Johns. & Hem.  
 186.

PT. III. T. 12,  
CH. 4, §. 2.

“ The donor must have evinced, by acts which admit of no other interpretation, that he himself had ceased to be, and that some other person had become, the beneficial owner of the subject of the gift or transfer; and that such legal right to it, if any, as he retained, was held by him in trust for the donee ” (a). **2256.**

Where a person holds property in trust, a declaration of trust, if bonâ fide, is valid, though at a distance of time, and even after the trustee has committed an act of bankruptcy (b). And if the signed document refers to any other document which shows what was meant by the parties, that will be sufficient (c). And if the terms of the trust do not sufficiently appear upon the face of the instrument, evidence may be received to show the position of the party signing, and the circumstances by which he knew himself to be surrounded, and the credibility of the instrument (d). **2257.**

How declarations of trust are construed.

Declarations of trust executed are construed in the same manner as common law conveyances (e). But, as we have seen, executory trusts are construed more liberally (f). **2258.**

(a) *Heartley v. Nicholson*, L. R. 19 Eq. 233.

(b) 2 Spence's Eq. Jur. 21.

(c) 2 Spence's Eq. Jur. 22.

(d) 2 Spence's Eq. Jur. 22.

(e) 4 Cruise T. 32, c. 19, § 66.

(f) 4 Cruise T. 32, c. 19, § 67.

See *supra*, par. 701, 702.

## CHAPTER V.

OF THE DIFFERENT KINDS OF DEEDS, WHEN CONSIDERED  
WITH REFERENCE TO THE PURPOSE TO BE EFFECTED BY  
THEM.

SOME of the various kinds of deeds serve as purchase deeds, PART III.  
T. 12, CH. 5. others as mortgage deeds, others as marriage settlements, others as deeds of family arrangement, others as deeds of indemnity, others as composition or creditors' deeds, others as apportionments of rents, others as partnership deeds, and others are used for certain other purposes, which will appear from the definitions given of them in the preceding pages. The attention of the reader will only be directed in this place to purchase deeds, so far as the covenants in them are concerned ; the other points connected with them forming the subjects of many other parts of this work. The law connected with marriage settlements will also be found in other parts of this work, with the exception of a few points which will be mentioned in the second section of this chapter. Mortgages and mortgage deeds have been already noticed. And, with the exception of some observations on deeds of compromise and family arrangement and creditors' deeds, which are made in the third and fourth sections, the reader is referred to other parts of this book, and to other works, for the points which ought to be borne in mind respecting the other kinds of deeds, when considered with reference to the purpose to be effected by them. **2259.**

## SECTION I.

*Of Purchase Deeds (a).*I. *Who Covenant for the Title.*

PR. III. T. 12,  
OH. 5, s. 1.

Persons con-  
veying in  
their own  
right.

All persons (except the Sovereign) who convey lands in their own right and for a valuable consideration are bound to enter into the usual covenants for the title (*b*). **2260.**

Husbands.

Where the wife's estate is sold by her and her husband, [under the old law,] as she cannot bind herself by covenant he enters into the ordinary covenants for title (*c*); [but this is altered in cases affected by stat. 45 & 46 Vict. c. 75 (Appendix).] **2261.**

Tenants for  
life.

Tenants for life are bound to covenant for title, where the estate is sold with their assent under a power, or where a power of sale has been obtained by them to be vested in trustees by an Act of Parliament. But covenants could not be required where the sale is compulsory under Railway Acts and the like (*d*). **2262.**

Persons  
whose es-  
tates are  
sold by the  
Court or by  
trustees.

A person whose estate is sold under an order of a Court of Equity, or by a trustee to whom he has conveyed it upon trust to sell, is bound to covenant for the title, in the same manner as he must have done if he himself had sold the estate (*e*). **2263.**

Cestuis que  
trust of the  
proceeds of  
sale.

Where lands are devised to trustees upon trust to sell, and the proceeds are absolutely given to two or more persons, all the persons whose shares in the purchase money are in anywise considerable, are bound to enter into the usual covenants for the title, to the extent of their respective shares (*f*). And the same course is adopted in

(*a*) Most of the points necessary to be borne in mind in connection with purchase deeds will be found under other heads, to which they properly belong.

(*b*) 4 Cruise T. 32, c. 25, § 82 ; Sugd. Concise View, 433.

(*c*) Sugd. Concise View, 433 ; 9 Jarm. & Byth. by Sweet, 455.

(*d*) Sugd. Concise View, 433.

(*e*) Sugd. Concise View, 432.

(*f*) 4 Cruise T. 32, c. 25, § 82,

84 ; Sugd. Concise View, 433.



practice, even where an estate is sold by trustees under a will, and the money is to be applied in payment of debts, etc., and the residue is given over, or where an estate is sold for similar purposes under an order of a Court of Equity, although the purchaser cannot insist on any covenants for the title in such cases. **2264.**

Pr. III. T. 12,  
Ch. 5, s. 1.

Where an estate is conveyed by persons who have no beneficial interest, such as trustees or assignees of a bankrupt, or with their concurrence, each is only bound to covenant that he has done no act to incumber the estate (*a*). **2265.**

Trustees or  
assignees.

A purchaser cannot insist on the bankrupt's covenanting for title (*b*). But the usual practice is for the bankrupt to enter into the ordinary covenants for title (*c*). **2266.**

Bankrupts.

## II. *Covenants for Title in the case of Estates in Fee.*

The covenants usually entered into by a vendor seised of the inheritance, are, 1st, that he is seised in fee. 2ndly, that he has power to convey, 3rdly, for quiet enjoyment by the purchaser, his heirs, and assigns. 4thly, that the land shall be held free from incumbrances. And 5thly, for further assurances (*d*). **2267.**

Usual cove-  
nants.

A man having merely a power to appoint an estate cannot be said to be seised in fee of the estate, although he has a right to convey; and therefore in such a case, it is usual to omit the first covenant, and to insert a covenant that the power was well created, and is not suspended or extinguished (*e*). **2268.**

Covenant  
where the  
vendor has  
only a  
power to  
appoint.

Where lands are conveyed to particular uses, instead of a covenant for quiet enjoyment, the words usually inserted

Covenant  
where the  
conveyance

(*a*) 4 Cruise T. 32, c. 25, § 75 ;  
Sugd. Concise View, 433—4 ; Bur-  
ton, § 577.

(*b*) 9 Jarm. & Byth. by Sweet,  
266 n. (*o*).

(*c*) Sugd. Concise View, 433.

(*d*) Sugd. Concise View, 459 ; 4  
Cruise T. 32, c. 25, § 45, 46, 49, 57,  
59 ; and see supra, par. 1808a.

(*e*) Sugd. Concise View, 459.

Pr.III. T.12,  
Ch. 5, s. 1.

is to parti-  
cular uses.

Covenant as  
to incum-  
brances.

are, that the estates conveyed shall be and remain to the uses thereby declared, without any eviction, etc. (a). **2269.**

With respect to the covenant as to incumbrances, which is always connected with the covenant for quiet enjoyment, the common form is not, that the estate is free from incumbrances, which would amount to a covenant that would be broken as soon as made if there were any incumbrance, but it is only that the purchaser shall enjoy free from incumbrances; and so long as he does so enjoy the estate, the covenant is not broken, although there may be incumbrances (b). **2270.**

Covenant  
for further  
assurance.

A covenant to do all reasonable acts, means such necessary acts as the law requires (c). **2271.**

Where any defects in the title, which may be supplied by the vendor, are discovered after the execution of the conveyance, the vendor may be compelled in equity to do whatever is necessary to supply such defects, by a bill for a specific performance of the covenant for further assurance, if the transaction is free from all objection (d). Under such a covenant, a purchaser may require the removal of a judgment or other incumbrance (e). But it is laid down by Lord Cowper, that a covenant for further assurance will not help the case, where the original conveyance itself is void (f). **2272.**

Where the agreement is to convey an estate upon a sale the purchaser would have a right to a conveyance with usual covenants, although nothing was expressed about covenants in the agreement (g). But where the conveyance is a further assurance, the purchaser must be supposed to have already obtained all such covenants and evidence as he was entitled to; and therefore he cannot insist upon any covenants which he ought to have obtained before

(a) 4 Cruise T. 32, c. 25, § 56.

(b) Sugd. Concise View, 471.

(c) Sugd. Concise View, 474.

(d) 4 Cruise T. 32, c. 25, § 93;

Sugd. Concise View, 473.

(e) Sugd. Concise View, 474.

(f) 4 Cruise T. 32, c. 25, § 94.

(g) Sugd. Concise View, 475.

(such, for instance, as a covenant for production of deeds), Pr. III. T. 12, Ch. 5, s. 1. under the covenant for further assurance (a). And it has been held that the covenant for further assurance does not entitle a purchaser who has neglected to obtain evidence of acts material to his title at the time of his purchase, afterwards to call for the production of such evidence, or to have the future preservation and production of the documents containing the evidence secured to him (b). **2273.**

If the seller's solicitor permits his client to enter into an unusual covenant for title, without explaining to him not only its effect, but also that it is an unusual covenant, and cannot be insisted on, the solicitor will be liable to the client for any consequent loss (c). **2274.** Duty of a solicitor as to unusual covenants.

A purchaser of land sold for building ground, who has been evicted, is entitled to recover upon his covenants, not only the value of the land, but also that of the houses erected thereon (d). **2275.** Eviction.

### III. *Covenants on Sale of Leaseholds.*

The usual covenants in assignments of leasehold estates, are, 1st. That the lease is valid in law, not forfeited, surrendered, or determined, or become void or voidable. 2ndly. That the assignor has good right to assign. 3rdly. That the rent has been paid, and the covenants performed up to the time of the assignment. 4thly. For quiet enjoyment during the term, free from incumbrances, without any restriction. And 5thly. For further assurance (e). **2276.** Usual covenants.

Where a leasehold estate is sold by the lessee, the purchaser is bound, without any express stipulation, to enter into a covenant with the vendor to indemnify him against the rent and covenants of the lease; because the original Covenants of indemnity.

- |                                    |   |
|------------------------------------|---|
| (a) Sugd. Concise View, 475—6 ;    | Jarm. & Byth. by Sweet, 373.                                |
| 1 Jarm. & Byth. by Sweet, 102.     | (d) <i>Bunny v. Hopkinson</i> , 27 Beav. 565.               |
| (b) 1 Jarm. & Byth. by Sweet, 102. | (e) 5 Cruise T. 32, c. 25, § 95; and see supra, par. 1803a. |
| (c) Sugd. Concise View, 430 ; 9    |   |

PT. III. T. 12,  
CH. 5, s. 1.

lessee continues liable, even for breaches of covenant committed after he has assigned. But where a leasehold estate is sold by an assignee of the lessee or of any other assignee, the vendor, by the assignment itself, is discharged from liability for any breaches of covenant not committed during the period of his ownership, unless he has entered into a covenant with the person for whom he purchased, whether lessee or assignee, to pay the rent and perform the covenants; and in that case he is entitled to an indemnity from the purchaser against this covenant, from which he is not released by his assignment (a). Except so far as the stat. 22 & 23 Vict. c. 35, s. 27, may protect him, the executor of a lessee assigning leaseholds to a legatee, whether specific or residuary, is entitled to an indemnity against the rent and covenants of the lease, to which, notwithstanding the assignment, he continues liable to the extent of the assets that have reached his hands (b). Where a leasehold estate is sold by the assignees of a bankrupt, inasmuch as such assignees are not liable to the covenants of the lease after assignment, nor to any covenant of indemnity the bankrupt may have entered into, they cannot require the purchaser to enter into a covenant for their indemnity or for the indemnity of the bankrupt—a circumstance which gives purchasers of leaseholds from assignees of bankrupts an important advantage (c). 2277.

#### IV. *Against whose Acts a Vendor should covenant.*

Covenants for the title are usually restrained and qualified according to the nature of the vendor's title. And although where covenants are several and of distinct

(a) 9 Jarm. & Byth. by Sweet, 172; Sugd. Concise View, 25; 4 Cruise T. 33, c. 25, § 37, 96; 2 Platt on Leases, 417; *Hickling v. Boyer*, 3 Mac. & G. 645; *Harding v. Metropolitan Railway Co.*, L. R. 7

Ch. Ap. 154, 157.

(b) 9 Jarm. & Byth. by Sweet, 839. See *supra*, par. 1815.

(c) Sugd. Concise View, 25; 9 Jarm. & Byth. by Sweet, 172, 272, 273.

natures, restrictive words annexed to one of them will not be applied to the others, yet where all the covenants have the same object, and restrictive words are annexed to the first of them, those words will be considered as extending to all the others (*a*). Where the vendor has himself purchased the estate, and has obtained proper covenants for the title, he is only bound (giving up the title deeds) to covenant against his own acts (*b*). But where the title deeds are not delivered up to the vendee, it is desirable that the covenants should extend to the acts of the person from whom the vendor purchased the estate; for the covenant to produce his purchase deeds cannot insure the production of them, which may be prevented by accidents, for which the vendor, in whose custody the deeds are, ought to be the sufferer, rather than the vendee (*c*). **2278.**

In equity it appears to be held that a vendor not claiming by purchase, is only bound to covenant against his own acts and those of the owner who immediately preceded him (*d*). But, upon principle and according to the settled practice of conveyancers, where a vendor derives title by descent, devise, or voluntary deed, without proper covenants for the title, he ought to covenant, not only against his own acts, but also against the acts of all the intermediate owners, up to the last purchaser for valuable consideration or other person who obtained proper covenants for the title, so that the purchaser from such vendor may be protected by covenants extending to the acts of all the successive owners of the property (*e*). **2279.**

(*a*) 4 Cruise T. 32, c. 25, § 68 ;  
Sugd. Concise View, 465.

(*b*) 4 Cruise T. 32, c. 25, § 72, 74 ;  
Sugd. Concise View, 432 ; 9 Jarm.  
& Byth. by Sweet, 373.

(*c*) 4 Cruise T. 32, c. 25, § 73 ;  
Fearne's Posth. Works, 110. But

see Sugd. Concise View, 432.

(*d*) Sugd. Concise View, 432 ; 9  
Jarm. & Byth. by Sweet, 373.

(*e*) Fearne's Posth. Works, 110 ;  
Sugd. Concise View, 432 ; 4 Cruise  
T. 32, c. 25, § 74—5 ; 9 Jarm. &  
Byth. by Sweet, 373.

PT. III. T. 12,  
CH. 5, S. 1.

Where there is a defect in the title, a purchaser has a right to covenants against all persons claiming a lawful title to the estate, which, unless the defect appears on the face of the conveyance, should be by a separate deed. And where a purchaser consents to take a defective title, relying for security on the vendor's covenant, this should be particularly mentioned to be the agreement of the parties; for otherwise, as the defect was known, it might be contended that the covenants for the title should not extend to warrant it against such particular defect (a). **2280.**

*V. To what kind of Acts Covenants will extend.*

As a general rule, covenants do not extend to tortious acts of strangers.

The law will never adjudge a person to covenant against the wrongful acts of strangers, unless his covenant is express to that purpose; for the law itself defends every one against wrong. And therefore, though a person may covenant in the most general terms for the title to lands, yet such covenant will not be able to extend to tortious acts. If general covenants extended to tortious evictions, a way might be opened for secret practices and combinations between a purchaser and strangers, that the purchasers might recover damages from the covenantors (b). **2281.**

Exceptions.

But where the covenant is to save the purchaser harmless from all acts of a particular person, there the vendor is bound to defend the purchaser against the entry of that person, whether by title or not (c). So where the covenant is against all claims to a particular right, it will extend to tortious as well as to legal claims (d). **2282.**

Covenants

Notwithstanding the engagement be expressly against

(a) 4 Cruise T. 32, c. 25, § 75 ;  
Sugd. Concise View, 431.

(c) 4 Cruise T. 32, c. 25, § 52 ;  
Sugd. Concise View, 459.

(b) Sugd. Concise View, 459 ;  
Burton, § 578 ; 4 Cruise T. 32,  
c. 25, § 50.

(d) 4 Cruise T. 32, c. 25, § 54 ;  
Sugd. Concise View, 460.

lawful acts, yet any act of the covenantor himself which amounts to an assertion of title, however groundless, will be a breach of covenant (a), although the act done by him was tortious and might be the subject of an action of trespass; and if the covenant extends to his heirs or executors, the rule equally applies to them (b).  
 2283.

Pr. III. T. 12,  
Ch. 5, s. 1.

extend to  
tortious acts  
of cove-  
nantor.

## SECTION II.

### *Of Marriage Settlements (c).*

Where a covenant is entered into to settle after-acquired property of the wife, it should be expressed whether it is intended to comprise property given to her separate use (d); and whether it is intended to be limited to the duration of the coverture. It would be so limited, in the absence of indication to the contrary. For, if a settlement upon a first marriage were construed to include property coming to the lady after the duration of the coverture she might soon become a widow, and all her fortune might go to the only child by a first marriage to the entire exclusion of numerous children of a subsequent marriage (e). 2284.

Pr. III. T. 12,  
Ch. 5, s. 2.

Covenant to  
settle or  
leave pro-  
perty, or as-  
signment.

An assignment by an intended wife of her future property, followed by a covenant by the intended husband to settle the after-acquired property of the wife, will not extend to property given to the wife in terms which are inconsistent with the trusts of the settlement (f). 2285.

A covenant to settle after-acquired property does not

(a) Burton, § 578.

(b) Sugd. Concise View, 460.

(c) Most of the points necessary to be borne in mind in connection with marriage settlements, will be found under other heads, to which they properly belong.

(d) See *Brooks v. Keith* 1 Dr. &

Sm. 462; *Willoughby v. Middleton*, 2 Johns. & Hem. 344; *Campbell v. Bainbridge*, L. R. 6 Eq. 649.

(e) *In re Campbell's Policies*, L. R. 6 Ch. D. 686, 690.

(f) *In re Mainwaring's Settlement*, L. R. 2 Eq. 487.

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comprise a life interest of the husband under a subsequent will; nor does a settlement of property "then in his possession or to which he might claim to be possessed of or interested in in any manner howsoever," comprise his life interest under a prior will (a). Where, in a marriage settlement, the intended wife has assigned all the property to which she then was, or to which she or her intended husband in her right should during the coverture become entitled, to trustees, upon the trusts thereby declared, this does not amount to a covenant to exercise a general power of appointment in favour of the objects and upon the trusts of the settlement. And if she appoints an annuity to herself, this will not be affected by the settlement, unless it was intended by the settlement that any after-acquired property should be converted or taken otherwise than in the state in which it should be so acquired. But if she appoints a gross sum to herself for her separate use, it will be bound by the trusts of the settlement, even though the appointment contained a power of revocation (b). Where husband and wife jointly or jointly and severally covenant to settle all property which the wife, or the husband in her right, might thereafter become entitled to, such a covenant (in the absence of any expressions to the contrary) does not apply to any property acquired after the determination of the coverture (c). **2286.**

A covenant in a marriage settlement, to settle property to which the wife was "then entitled for any interest whatever," applies to property to which she was entitled on the death of another, or in contingency (d). **2287.**

(a) *St. Aubyn v. Humphreys*, 22 Beav. 175; *White v. Briggs*, decided by Lord Cottenham, C., and reported 22 Beav. 176, note.

(b) *Ewart v. Ewart*, 11 Hare 276.

(c) *Dickinson v. Dillwyn*, L. R. 8 Eq. 546; *Carter v. Carter*, L. R. 8

Eq. 551; *In re Edwards*, L. R. 9 Ch. Ap. 97.

(d) *In re Mackenzie's Settlement*, L. R. 2 Ch. Ap. 345; *Agar v. George*, L. R. 2 Ch. D. 706; *In re Jackson's Will*, L. R. 13 Ch. D. 189.



A covenant to settle all the real and personal estate of or to which the intended wife should at any time during the coverture become seised, possessed, or entitled, does not comprise a vested estate in the moiety of a leasehold which she had at the time of the marriage; though it does comprise the other moiety which she did not acquire till after the marriage: nor does it comprise a vested interest in certain property, though at the time of the marriage it was not ascertained whether it would turn out to be of any value or not (a). And it has been held that it does not comprise money received for commutation of half-pay (b). **2288.**

And if a person covenants to settle any real or personal estate which should descend, devolve to, or vest in his wife, or to or in him in her right, the covenant will not include property which belonged to the wife at the time (c). **2289.**

The words, "become entitled," import a change of condition; and hence they include a contingent interest which becomes vested during the coverture, but they do not include stock vested in possession at the date of the settlement (d). And they may also include property which was a vested remainder at the time of the marriage, and becomes vested in possession during the coverture (e). **2290.**

Where a father, on a treaty for the marriage of his daughter, promises the intended husband that at the father's decease she shall have her share of whatever

(a) *Wilton v. Colvin*, 3 Drewry 617. *In re Browne's Will*, L. R. 7 Eq. 231. See *Re Hughes's Trusts*, 4 Gif. 432; *In re Pedder's Settlement Trusts*, L. R. 10 Eq. 585.

(b) *Churchill v. Denny*, L. R. 20 Eq. 534.

(c) *Churchill v. Shepperd*, 33 Beav. 107. *In re Wyndham's Trusts*, L. R. 1 Eq. 290.

(d) *Archer v. Kelly*, 1 Dr. & Sm. 300.

(e) *In re Clinton's Trust*, L. R. 13 Eq. 295. On this subject, see also the conflicting decisions, *In re Viant's Settlement Trusts*, L. R. 18 Eq. 436; and *In re Jones' Will*, L. R. 2 Ch. D. 362; see also *In re Michell's Trusts*, L. R. 9 Ch. D. (Ap.) 5.

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property he shall die possessed of, the daughter will be entitled to the share of personalty which she would take under the Statute of Distributions in case of an intestacy, but not any real estate (a). **2291**

Where articles and settlement vary.

Where there are articles and a settlement before marriage, there, as a general rule, the settlement alone can be looked to: if it is different from the articles, it must be taken as a new agreement. But if it purports to be executed in pursuance of the articles, or if there is clear and satisfactory evidence showing that the discrepancy had arisen from a mistake, the Court will reform the settlement, and make it conformable to the real intention of the parties (b). If the articles are before marriage and the settlement after marriage, the articles are in effect the binding settlement; and if the settlement gives estates or interests different from those which the Court would give on the construction of the articles, the settlement will be reformed, as between the parties and their representatives and mere volunteers, but not as against a purchaser for valuable consideration without notice (c). **2292.**

Clause of accruer.

In a marriage settlement there is sometimes a clause providing that "in case any of the younger sons shall become an eldest or only son," his portion shall accrue to the other children. And by force of this clause a younger son may lose his portion on becoming an eldest or only son, although he may not have succeeded to the property of his elder brother (d). This is, of course, contrary to the intention of the settlor, who must be presumed to have intended that all the children of the marriage should be provided for. It is evident, therefore, that the condition on which the accruer is to take place ought to be more fully and accurately expressed. **2293.**

(a) *Laver v. Fielder*, 32 Beav. 1.

(b) 2 Spence's Eq. Jur. 140; *Bold v. Hutchinson*, 5 D. M. & G. 558, 568.

(c) 2 Spence's Eq. Jur. 140—1;

Peachy on Settl. 132. See *Mignan v. Parry*, 31 Beav. 211.

(d) See *Peacock v. Pares*, 2 Keen 689.

A clause in a marriage settlement, requiring the trustees, at the request in writing of the wife, to advance part of the trust moneys to the husband, on the security of his bond, with a proviso that they should not be obliged to call in the moneys so lent unless required by the wife, ceases to be applicable to the husband after he has taken the benefit of any Act for the relief of insolvent debtors (a). **2294.**

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Clause authorizing a loan to the husband.

Where a person makes a settlement on his first marriage on his sons in tail, remainder to persons not within the consideration of the marriage, and subsequently, on a second marriage, covenants that he will settle the reversion expectant upon the decease of his sons without issue, to the use of the children of that marriage, it has been held by Sir E. Sugden, when Lord Chancellor of Ireland, that they will take in preference to the persons claiming under the voluntary limitations in the first settlement (b). **2295.**

Preference of children claiming under a settlement on a second marriage over volunteers claiming under a settlement on a first marriage.

Where a testator directs a settlement to be made, he is deemed to have intended that all usual powers should be inserted; such as powers of leasing, sale and exchange, with a receipt clause, in the case of real estate, and provisions for maintenance, education, and advancement, and appointment of new trustees (c). **2296.**

Direction to make a settlement.

Where a fund is directed to be settled on a daughter and her issue, so that the same may not be subject to her husband's control or engagements, the proper mode is to settle the property on her for life, for her separate use, without power of anticipation; after her death, to her issue, as she shall appoint by deed or will; and in default of appointment to the issue living at her death, equally, per stirpes; and in default of such issue, then as she shall

Mode of settling a fortune on daughter.

(a) *Boss v. Godsell*, 1 Y. & C. C. Dru. & W. 320. C. 617.

(c) *Turner v. Sargent*, 17 Beav.

(b) *Stackpoole v. Stackpoole*, 4 515.

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appoint by will; and in default of appointment, to her executors, administrators, and assigns (a). 2297.

Or, it may be stated in such words as these: "The mode of settling a wife's fortune which is approved by the Court is, to give her the first life interest for her separate use; then a life interest to the husband; then (subject to powers given to the husband and wife of appointing the fund among the issue of the marriage) it is given equally to such of the children as, being sons, attain twenty-one, or, being daughters, attain that age or marry, or else to the children equally, with gifts over in favour of the others, if any of them, being sons, die under twenty-one, or, being daughters, die under that age and unmarried; if there is no child, who, being a son, attains twenty-one, or, being a daughter, attains twenty-one or marries, then, if the wife survives, the fund is limited to her; but if she dies in her husband's lifetime she has a general power of appointment over it; and in default of any exercise of that power, it is given to her next of kin, as if she had died intestate and without having married" (b). And as a general rule the parents should have a joint power of appointing among the children by deed, with remainder, as the survivor shall by deed or will appoint (c). 2298.

Setting  
aside, re-  
forming, or  
varying a  
settlement.

An antenuptial settlement cannot be set aside, reformed, or varied, on the ground that it was intended that there should be a pecuniary consideration on both sides, whereas the pecuniary consideration on one side has failed; and this is the case, whether as between the persons who are within the marriage consideration, or as between the husband and appointees of the wife who are strangers; for, such appointees, though volunteers as

(a) *Stanley v. Jackman*, 23 Beav. 450; *Smith v. Iliffe*, L. R. 20 Eq. 666. *Cogan v. Duffield*, L. R. 2 Ch. D. 49, 50.

(c) *In re Goman*, L. R. 17 Ch. D. 778, 780.

(b) Lord Justice *Baggallay*, in

between the wife and themselves, are not volunteers as between themselves and the husband, but claim under and therefore stand in the situation of a purchaser (a). **2299.**

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Where a settlement is made by a person in illness and under the apprehension of speedy dissolution, it should contain a power of revocation, so as to give him the opportunity of revoking it in case of his recovery and forming a cool judgment; and if such a power is not inserted, the deed will be set aside (b). **2300.**

Settlement  
under ap-  
prehension  
of death.

If, in a marriage settlement, a person enters into a covenant to settle property on the objects of the settlement, in case another person who covenants so to do should also settle property upon them, and it is intended that the covenant of the one should not be performed unless the other should make such settlement on his part, care should be taken unequivocally to express that intention. For though the making of such settlement by the other may appear to be a condition precedent, looking to the terms of the covenant alone; yet, if from any other part of the instrument it appears to be doubtful whether it was intended to be a condition precedent, it will not be construed as such, because, as a general rule, in marriage contracts there can be no resistance on the part of one, merely because another contracting party has failed to perform his part of the agreement; inasmuch as the parties to the contract are not the only persons having an interest in the subject, but the contract is made by them on behalf of the issue of the marriage (c). **2301.**

Mutual cove-  
nant to  
settle pro-  
perty.

[A wife has power during coverture to elect to confirm or disaffirm a settlement executed by her while an infant,

Settlement  
by an  
infant lady  
voidable.

(a) *Campbell v. Ingilby*, 21 192.  
Beav. 567; 1 D. & J. 393.

(c) *Lloyd v. Lloyd*, 2 My. & Cr.

(b) *Forshaw v. Welsby*, 30 Beav. 192.

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and if she becomes of unsound mind, though not so found by inquisition, the Court has jurisdiction to elect on her behalf (a).] **2301a.**

Execution  
of marriage  
articles.

Marriage articles will be specifically executed on the application of any person within the scope of the consideration of the marriage, or of those claiming under any such person. But they will not be specifically executed on the application of persons who are volunteers, even of a wife or child by a subsequent marriage; although where the suit is brought by persons who are within the scope of the consideration, or by those claiming under them, Courts of Equity will decree a specific execution throughout, as well in favour of the mere volunteers, as of the plaintiff; as they either execute them in toto, or not at all (b). **2302.**

Settlement  
on a ward of  
Court.

In a settlement on the marriage of a female ward of Court, provision must be made, out of her fortune, for the children of a future marriage (c). **2303.**

Settlement  
by a lady  
shortly after  
majority.

Where a settlement is executed a few days after the lady, who was a ward of Court, has attained her majority, and is pursuant to proposals made a very short time before she attained her majority, and is such that the Court would not approve thereof, it will be rectified, if at least it was the work of her friends, and she was not made to understand its effect and called upon to exercise her judgment upon it (d). **2304.**

A settlement made by an unmarried lady shortly after majority, without contemplating marriage with any particular person, will be set aside, as an improvident act of a person who ought to be protected by the Court (e). **2305.**

Limitation  
or appoint-

The effect of a limitation or appointment of personalty to the executors and administrators of a settlor, is, simply

(a) *Wilder v. Pigott*, L. R. 22  
Ch. D. 263.

(b) *Story's Eq. Jur.* § 986, 987 ;  
2 *Spence's Eq. Jur.* 287.

(c) *Rudge v. Winnell*, 10 Beav. 98.

(d) *Money v. Money*, 3 Drewry 256.

(e) *Everitt v. Everitt*, L. R. 10  
Eq. 405.

to add it to his general personal estate, so as to subject it to any disposition which he may make of it in his lifetime or by his will, or to any liability incident to his general personal estate (as to the claims of trustees in bankruptcy or insolvency), or to the Statutes of Distribution, as the case may be. And this rule applies even to money payable at the settlor's death under a policy of life assurance, because the settlor or his trustees may sell the policies at once (a). **2306.**

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ment to the  
executors  
and admi-  
nistrators of  
a settlor.

Relief will be granted against acts secretly done by a woman in contravention of the marital rights, or in disappointment of the just expectations of her intended husband; as where a woman, in contemplation of marriage and without the privity of her intended husband, makes a settlement to her separate use, or a conveyance in favour of persons for whom she is under no moral obligation to provide. But a reasonable provision for her children by a former marriage, under circumstances of good faith, is free from objection (b). **2307.**

Frauds on  
marital  
rights or ex-  
pectations.

[Settlements on a marriage between a man and his deceased wife's sister, which are made by either of them in favour of the other, are void (c), except, perhaps, such a settlement as that in the case of *Ayerst v. Jenkins* (d).] **2308.**

Settlements  
on marriage  
with de-  
ceased wife's  
sister.

Where a marriage settlement contains a power of revoking the uses, trusts, etc., and of appointing new uses, trusts, etc., in lieu of those revoked, this power only authorises a revocation for the purpose of resettling the estate for the benefit of the cestuis que trust, and does not authorise a mortgage for a sum to be paid to the husband (e). **2309.**

Power of  
revocation.

(a) *Mackenzie v. Mackenzie*, 3 Mac. & G. 559.

J. 521; *Pawson v. Brown*, L. R. 13 Ch. D. 202.

(b) Story's Eq. Jur. § 273; 2 Spence's Eq. Jur. 505.

(d) L. R. 16 Eq. 275.

(e) *Eland v. Barker*, 29 Beav. 137.

(c) *Coulson v. Alison*, 2 D. F. &

## SECTION III.

*Of Deeds of Compromise and Family Arrangement.*

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In the case of a compromise of doubtful rights, if all the parties are in a state of mutual ignorance, or they are all acquainted with the doubts which exist in their favour, the compromise is binding. But where one or more of them is or are not aware of the doubts existing in his or their favour, while the fact that such doubts exist is known to the other or others of them, the compromise is not binding (*a*); because, in that case, there is room for the presumption of surprise or confidence abused, and the very nature of the transaction made it requisite that all the parties should be on an equality as regards knowledge or ignorance of the doubts existing in their favour. To render a family compromise binding, there must be an honest disclosure, by each party to the other, of all such material facts known to them, relative to their rights and title, as are calculated to influence the judgment in the adoption of the compromise; and any advantage taken by either of the parties of the known ignorance of the other of such facts renders such compromise void in equity (*b*). **2310.**

Deeds of the nature of family arrangements are exempted from the rules as to the adequacy of the consideration applicable to other deeds; the consideration in such cases being compounded partly of value and partly of natural love and affection. And it is not necessary that there should be any rights in dispute, in order to uphold them (*c*). **2311.**

(*a*) See Story's Eq. Jur. § 130—1.

(*b*) *Smith v. Pincombe*, 3 Mac. & G. 659; *Greenwood v. Greenwood*, 2 D. J. & S. 28; *Brooke v. Lord Mostyn*, 2 D. J. & S. 373.

(*c*) *Persse v. Persse*, 7 Cl. & F.

279; *Williams v. Williams*, 2 Dr. & Sm. 378; L. R. 2 Ch. Ap. 294. As to deeds of this nature, see also *Dimsdale v. Dimsdale*, 3 Drewry 556, 569—571.



To render the compromise of litigation valid, it is not necessary that the question in dispute should be really doubtful, if the parties bonâ fide considered it to be so (a). **2312.**

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## SECTION IV.

### *Of Creditors' Deeds.*

#### *I. Creditors' Deeds generally.*

It will appear from a preceding and a subsequent chapter that a conveyance or assignment may be valid, under certain circumstances, even though made by an insolvent debtor in favour of a particular creditor: and that, on the other hand, a conveyance or assignment by such a person may be invalid, under certain circumstances even though made for the benefit of all his creditors (b). **2313.**

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Conveyance  
or assign-  
ment for a  
particular  
creditor  
may be  
valid, and  
for all the  
creditors  
invalid.

Conveyances in trust to sell and pay creditors are in the nature of an instrument of agency, and revocable at the will of the debtor, unless the creditors are executing parties, or the deed has been acted upon, or notice given to the creditors (c). **2314.**

Revocable-  
ness of con-  
veyances in  
trust for  
creditors.

A conveyance by a debtor of his goods to two creditors, for the benefit of themselves and the other creditors passes the property at once on the execution of the deed by the debtor, without any assent on the part of the trustees (d). **2315.**

Passing of  
the pro-  
perty.

Where a deed of assignment purports to be made by all the partners in a firm, and to convey all their personal estate and effects whatsoever in trust for the benefit of creditors, and it is executed by only one of the partners,

Deed of  
assignment  
executed by  
one only of  
the as-  
signors.

(a) *Lucy's Case*, 4 D. M. & G. 356.

(b) See *supra*, par. 1582; *infra*, par. 2375—2384.

(c) *Coote Mortg.* 3rd ed. 164; *Story's Eq. Jur.* § 1036 b; *Steele v.*

*Murphy*, 3 Moore's P. C. C. 445;

*Johns v. James*, L. R. 8 Ch. D. (Ap.) 744.

(d) *Hobson v. Thelluson*, L. R. 2 Q. B. 642.

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it operates to convey all his separate effects, and all his share in the joint effects (a). **2316.**

Where creditors take, though not parties, etc.

In order to entitle the creditors named in a general assignment for the benefit of creditors to take under it, it is not necessary that they should be technical parties thereto, unless they are named in the assignment as parties, and are expressly required to execute before they can take under its provisions. It is sufficient if they have notice of the trust in their favour, and assent to it; and if there is no stipulation for a release, or any other condition in it which may not be for their benefit, their assent will be presumed, till the contrary appears (b). **2317.**

Under special circumstances, creditors who have not acceded to a composition deed within the time limited by it, may participate in the benefits thereof (c). And where creditors have acted under a deed of composition and treated it as valid, a Court of Equity will also act under it and treat it as valid as against the assignor, though the creditors have not executed it within the time prescribed (d). A deed of trust for the benefit of creditors is not avoided, though the creditors named as parties to it of the second part are described as the several persons whose names and the amount of whose debts are set out in a schedule thereunto annexed, and yet there is no schedule annexed at the time of execution, and erasures are made in the names of some of the creditors written in the schedule afterwards added, and against the names of others no sums are set (e). **2318.**

Frauds on creditors.

If any creditor who is a party to a composition deed, has, unknown to the other creditors, obtained any benefit

(a) *Bowker v. Burdekin*, 11 M. Johns & Hem. 444.  
& W. 128.

(b) Story's Eq. Jur. § 1036 a; *re Baber's Trusts*, L. R. 10 Eq. 554.  
see *Biron v. Mount*, 24 Beav. 642. (e) *West v. Steuard*, 14 M. & W.

(c) *Whitmore v. Turquand*, 1 47.

or security, either from the debtor or a third person, beyond what the others have received, or enters into a contract with the debtor which prevents him from being put into that situation of freedom from resisting demands which may be considered as one of the chief inducements to the others to sign the deed, it is a fraud on the policy of the law; and such secret arrangements are entirely void, even as against the assenting debtor, or his sureties, or his friends; and money paid under them may be recovered back (a). **2319.**

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II. *Deeds of Arrangement, under the Bankruptcy Act of 1861, where there have been Proceedings in Bankruptcy (b).*

By s. 187, "If the proceedings in bankruptcy be stayed as herein provided, the bankrupt, or any creditor nominated in that behalf by the meeting aforesaid, may, at any time within the period during which the proceedings are so stayed, produce to the Court a deed of arrangement, signed by or on behalf of three-fourths in number and value of all the creditors of the bankrupt; and the Court may consider the same, and may examine on oath the bankrupt and any of the creditors who may desire to be heard in support of or in opposition to the deed, and may make such other inquiry as it may think necessary; and if the Court shall be satisfied that the deed has been duly entered into and executed, and that its terms are reasonable and calculated to benefit the general body of the creditors under the estate, it shall by order make a declaration of the complete execution of the deed, and shall direct the same to be registered with the chief registrar, and shall also, if it thinks fit, annul the bankruptcy;

Power for Court to make a declaration of complete execution of deed of arrangement; and to direct it to be registered; and to annul bankruptcy.

(a) See Story's Eq. Jur. § 378—9;  
2 Spence's Eq. Jur. 357—360;  
*Pfleger v. Browne*, 28 Beav.  
391.

(b) See enactments in the amending Act, 31 & 32 Vict. c. 104, some of which are stated infra, par. 2325—2330.

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Deed, if so  
registered,  
to be bind-  
ing on cre-  
ditors not  
executing.

and such deed shall thereafter be as binding in all respects on any creditor who has not executed the deed as if he had executed it, provided such deed be registered with the chief registrar in manner directed by the order." **2320.**

Deed to be  
registered in  
the Court  
of Bank-  
ruptcy, and  
in default  
not to be  
received in  
evidence.

By s. 194 of the same statute, "Every deed, instrument, or agreement whatsoever, by which a debtor, not being a bankrupt, conveys or covenants or agrees to convey his estate and effects, or the principal part thereof, for the benefit of his creditors, or makes any arrangement or agreement with his creditors, or any person on their behalf, for the distribution, inspection, conduct, management, or winding up of his affairs or estate, or the release or discharge of such debtor from his debts or liabilities, shall, within twenty-eight days from and after the execution thereof by such debtor, or within such further time as the Court in London shall allow, be registered in the Court of Bankruptcy; and in default thereof shall not be received in evidence" (a). **2320a.**

### III. *Deeds of Composition, under the Bankruptcy Act of 1861, subject to the Jurisdiction of the Court of Bankruptcy, where no Bankruptcy Proceedings have been taken (b).*

What deeds  
to be valid;  
and upon  
what condi-  
tions.

By the stat. 24 & 25 Vict. c. 134, s. 192, "Every deed or instrument made or entered into between a debtor and his creditors, or any of them, or a trustee on their behalf, relating to the debts or liabilities of the debtor, and his release therefrom, or the distribution, inspection, management, and winding up of his estate, or any of such matters, shall be as valid and effectual and binding on all the creditors of such debtor as if they were parties to and had

(a) This section does not apply to deeds under s. 192. See 2 Griffiths and Holmes on Bankruptcy. pp. 1029, 1030.

(b) See enactments in the amending Act, 31 & 32 Vict. c. 104, some of which are stated infra, par. 2325—2330.

duly executed the same, provided the following conditions be observed ; that is to say, 1. A majority in number representing three-fourths in value of the creditors of such debtor whose debts shall respectively amount to ten pounds and upwards shall, before or after the execution thereof by the debtor, in writing assent to or approve of such deed or instrument ; 2. If a trustee or trustees be appointed by such deed or instrument, such trustee or trustees shall execute the same ; 3. The execution of such deed or instrument by the debtor shall be attested by an attorney or solicitor ; 4. Within twenty-eight days from the day of the execution of such deed or instrument by the debtor, the same shall be produced and left (having been first duly stamped) at the office of the chief registrar, for the purpose of being registered ; 5. Together with such deed or instrument there shall be delivered to the chief registrar an affidavit by the debtor or some person able to depose thereto, or a certificate by the trustee or trustees, that a majority in number representing three-fourths in value, of the creditors of the debtor whose debts amount to ten pounds or upwards have in writing assented to or approved of such deed or instrument, and also stating the amount in value of the property and credits of the debtor comprised in such deed ; 6. Such deed or instrument shall, before registration, bear such ordinary and ad valorem stamp duties as are hereinafter provided ; 7. Immediately on the execution thereof by the debtor, possession of all the property comprised therein, of which the debtor can give or order possession, shall be given to the trustees."

**2321.**

By s. 196, " Every such deed, on being so registered as Memorandum of registration. aforesaid, shall have a memorandum thereof written on the face of such deed, stating the day and the hour of the day at which the same was brought into the office of the chief registrar for registration." **2322.**

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Jurisdiction  
of the Court,  
and rights  
and liabilities  
of the  
parties, after  
registration  
of deed.

By s. 197, "From and after the registration of every such deed or instrument in manner aforesaid, the debtor and creditors, and trustees, parties to such deed, or who have assented thereto or are bound thereby, shall in all matters relating to the estates and effects of such debtor be subject to the jurisdiction of the Court of Bankruptcy, and shall respectively have the benefit of and be liable to all the provisions of this Act, in the same or like manner as if the debtor had been adjudged a bankrupt, and the creditors had proved, and the trustees had been appointed creditors' assignees under such bankruptcy; and the existing or future trustees of any such deed or instrument, and the creditors under the same, shall as between themselves respectively, and as between themselves and the debtor and against third persons, have the same powers, rights, and remedies, with respect to the debtor and his estate and effects, and the collection and recovery of the same, as are possessed or may be used or exercised by assignees or creditors with respect to the bankrupt, or his acts, estate and effects in bankruptcy; and, except where the deed shall expressly provide otherwise, the Court shall determine all questions arising under the deed according to the law and practice in bankruptcy, so far as they may be applicable, and shall have power to make and enforce all such orders as it would be authorised to do if the debtor in such deed had been adjudged bankrupt and his estate were administered in bankruptcy." 2323.

Provision  
in case  
debtor cannot  
obtain  
assent of  
requisite  
majority of  
creditors.

By s. 200, "If a debtor cannot obtain the assent of a majority in number representing three-fourths in value of his creditors, by reason of his being unable to ascertain by whom bills of exchange, promissory notes, or other negotiable securities accepted, drawn, made, or indorsed by him are holden, or by reason of the absence of creditors in a foreign country, or other similar circumstances, it shall be sufficient if he obtain the consent of a majority in number

representing three-fourths in value of all his other creditors to such deed or instrument as aforesaid; provided that notice shall have been inserted by or on behalf of the debtor in one or more newspapers published in the county or place at which he shall have carried on business immediately prior to the date of such deed or instrument, requiring his creditors to signify their assent to or dissent from such deed or instrument by notice in writing addressed to the trustee or trustees thereof within fourteen days from the insertion of such notice, and that the affidavit or certificate of the trustee or trustees shall state the circumstances of the case, and the same shall be allowed by the Court, and provided the deed or instrument be in such form as is expressed in Schedule (D.) to this Act annexed, which shall vest all the estate and effects of the debtor in the trustees of such deed, and provided that all such other conditions as are hereinbefore required be duly complied with." **2324.**

Pr. III. T. 12,  
Ch. 5, s. 4.

IV. *Some Enactments in the "Act to amend the Bankruptcy Act, 1861."*

By the stat. 31 & 32 Vict. c. 104, s. 1, it is enacted that "no deed or instrument made or entered into between a debtor and his creditors, or any of them, or a trustee on their behalf, relating to the debts or liabilities of the debtor and his release therefrom, or the distribution, inspection, management, and winding up of his estate, or any of such matters, shall be as valid, effectual, and binding on all the creditors of such debtor as if they were parties to and had duly executed the same, unless, in addition to the condition to be observed in accordance with the provisions of the Bankruptcy Act, 1861, the following conditions shall be observed; that is to say," **2325.**

Superadded  
conditions.

"1. Together with such deed or instrument there shall be delivered to the chief registrar a list showing, to the

PT. III. T. 12,  
CH. 5, S. 4.

best of the knowledge, information, and belief of the debtor or other person by whom the list is made, the debts and liabilities of every kind of the debtor, and the times when such debts and liabilities were contracted or incurred, and the considerations for the same, the names, residences, and occupations of his creditors, and the respective amounts due to them, and the securities held by them, and the estimated value of such securities :” **2326.**

“ 2. A statement showing, to the best of the knowledge, information, and belief of the debtor or other person by whom the statement is made, the debtor’s property and credits, and the estimated value thereof.” **2327.**

Who shall be  
reckoned  
creditors.  
Registra-  
tion.

By s. 3 it is enacted that “ no creditor shall be reckoned in the computation of the requisite majority in number representing three-fourths in value of the creditors of the debtor executing such deed or instrument unless he proves his debt by affidavit or declaration in the manner and subject and according to the provisions to be prescribed by general orders ; and in the computation of the requisite value of such creditors, and for all other purposes of the deed, the amount due to each creditor, after deducting the value of the securities held by him on the debtor’s property, shall alone be reckoned ; and notwithstanding anything in the Bankruptcy Act, 1861, the time for the production and leaving of any such deed or instrument at the office of the chief registrar as therein provided shall be twenty-eight days from the day of the execution thereof by the debtor, or such further time as the Court may allow.” **2328.**

By s. 7 it is enacted that “ in case of a deed of arrangement under section 187 of the Bankruptcy Act, 1861, no creditor shall be reckoned in the computation of the requisite majority in number and value of the creditors of the bankrupt unless he proves his debt by affidavit or declaration in the manner and subject and according to



the provisions to be prescribed by general orders; and in Pr. III. T. 12,  
Ch. 5, s. 4. the computation of the requisite value of such creditors, and for all other purposes of the deed, the amount due to each creditor, after deducting the value of the securities held by him on the bankrupt's property, shall alone be reckoned. **2329.**

By s. 15, "This Act shall commence and take effect on the 11th day of October, 1868, and shall be construed together with so much of the Bankrupt Law Consolidation Act, 1849, the Bankruptcy Act, 1854, and the Bankruptcy Act, 1861, as is in force, as one Act, and may be cited for all purposes as The Bankruptcy Amendment Act, 1868." Commence-  
ment of Act,  
etc. **2330.**

[All the above-mentioned Bankruptcy Acts have been repealed by the Bankruptcy Repeal and Insolvent Court Act, 1869 (stat. 32 & 33 Vict. c. 83), in order to facilitate the working of the Bankruptcy Act, 1869 (stat. 32 & 33 Vict. c. 71), on which the whole law of bankruptcy until recently depended; but the Bankruptcy Act, 1883 (stat. 46 & 47 Vict. c. 52) (a), which comes into general operation on the 1st of January, 1884, repeals the Act of 1869. The Bankruptcy Act, 1883, as was the case with the Bankruptcy Act, 1869, contains no enactments to fill the place of the preceding sections of the Bankruptcy Act, 1861, and the Bankruptcy Amendment Act, 1868, respecting creditors' deeds.] **2330a.**

(a) See Appendix.

## CHAPTER VI.

## OF VOID AND VOIDABLE DEEDS AND CONTRACTS (a)

## SECTION I.

*Of Deeds which are Invalid by reason of the Absence of any Consideration, or the Inadequacy or Unlawfulness of the Consideration.*

I. *Absence or Failure of Consideration.*

PT. III. T. 12  
CH. 6, S. 1.

Considerations are either valuable or good.

LAWFUL considerations are of two kinds: valuable and good. A valuable consideration is money, or any other thing that bears a known value, or marriage, or some other benefit to the person making a promise, however slight, or to a third person, by the act of the promisee, or any loss, trouble, detriment, or inconvenience to, or charge or liability upon, the promisee, however slight, for the sake or at the instance of the promisor, though without any benefit to the promisor, or the prevention of litigation, or the settlement of disputes. A good consideration is affection for a child or relation, or the payment of debts by the debtor (b). **2331.**

The suspension or forbearance of proceedings at law or in equity, in respect of a legal or equitable claim,

(a) Of course this chapter only points out some of the grounds, not noticed under other heads, on which deeds are void or voidable. The perusal of other parts of the work will at once direct the reader to

other grounds of invalidity.

(b) See 4 Cruise T. 32, c. 2, § 50, 51; Smith's Common Law Manual, 9th ed. par. 174—7; *Keenan v. Handley*, 2 D. J. & S. 283.

though it be only a doubtful one, and though indeed it ultimately turn out to be unfounded, is a sufficient valuable consideration for a promise either by the party liable or by any third person, provided the claim was made bonâ fide in the belief that it was well founded, and not fraudulently (a). 2332.

Pr. III. T. 12,  
Ch. 6, s. 1.

In the case of deeds operating by transmutation of the possession, no consideration is necessary, as between the parties, nor as to strangers, except in cases of actual or constructive fraud (b). But in the case of deeds operating without transmutation of the possession, that is, bargains and sales, and covenants to stand seised, a consideration is absolutely necessary (c). 2333.

In what  
cases a con-  
sideration is  
necessary.

Where a person executes and delivers a deed of conveyance of equitable property to a volunteer, or where the legal estate is transferred and a trust of it is declared in favour of a volunteer, and there is nothing upon the face of the transaction or from contemporaneous evidence to show that it was intended to be revocable, it cannot be revoked or avoided in any way. And even if the donor procures a retransfer of stock by the trustees, and, where it is in writing, cancels the instrument, and by will makes a provision for the same cestuis que trust, still the settlement is binding; and unless the subsequent provision is expressed to be substitutionary, the cestuis que trust, if the gift is not by way of portion, will take both. They will have their election, if it is expressed to be in substitution; and stock not being within the stat. 27 Eliz. c. 4, a purchaser from the donor cannot avoid the voluntary settlement or gift (d). 2334.

Revocable-  
ness of a  
voluntary  
deed.

(a) Sm. Con. 146—7, 150; Ad. Con. 12; Chit. Con. 24—9; *Cook v. Wright*, 1 Best & Sm. 559; *Keenan v. Handley*, 2 D. J. & S. 283; *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449.

(b) See infra, sect. III., on voluntary deeds void as against purchasers and creditors.

(c) 4 Cruise T. 32, c. 2, § 46; 2 Pres. Shep. T. 510; Burton, § 536.

(d) 2 Spence's Eq. Jur. 882—3.

PT. III. T. 12,  
CH. 6, s. 1.

The keeping a deed, so executed as to pass an estate or interest, in the donor's possession, is not of itself sufficient to enable the donor to revoke it by cancellation or by will; though no notice of it may have been given to any one: and though it may have been foolishly or inconsiderately executed (*a*). Hence, a person unmarried cannot recall a voluntary deed which he has executed for the benefit of future children. Nor can he relieve himself from a provision by which he has chosen, for the benefit of those children, to submit to the discretion of a third person the extent of the enjoyment of the income of his property (*b*). And where a femme sole made a settlement of personal property upon certain trusts for herself, and any husband with whom she might intermarry, and any children she might have, and her appointees and next of kin, it was held to be irrevocable years afterwards, although she never married, and it did not appear that it was made in contemplation of an immediate marriage, or of a marriage with any particular individual at any subsequent time: and although it was alleged in the will, and the probability was that it was executed solely in order to protect herself against the importunities of relations, and was purely voluntary, and although, in consequence of the locking up of the capital, she became greatly embarrassed (*c*). 2335.

Enforcing  
voluntary  
deeds.

Courts of Equity will enforce an obligation imposed by will, without any consideration (*d*). But they will not enforce, either against the party himself or any volunteers, claiming under him, any contract or any imperfect gifts inter vivos (not being donations mortis causâ) or imperfect assignments of debts or other property, or executory trusts raised by a covenant or agreement, or defective or im-

(*a*) 2 Spence's Eq. Jur. 885; *Re Way's Trusts*, 2 D. J. & S. 365.

(*b*) *Petre v. Espinasse*, 2 My. & K. 496.

(*c*) 2 Spence's Eq. Jur. 129, 255; *Bill v. Cureton*, 2 My. & K. 503.

But see *supra*, par. 2304—5.

(*d*) 2 Spence's Eq. Jur. 255.

perfect settlements or conveyances, which are not founded in a valuable consideration, even though the transaction be founded on a meritorious consideration, as in the case of a provision for a wife or child; that is, equity will not enforce them so far as something is sought beyond what, if anything, may be recovered under them at law, although it will, if necessary, give effect to any legal obligation created by them. But if a transfer, assignment, trust, settlement, or conveyance is complete, so that no act remains to be done to give full effect to the title, equity will enforce it throughout against the party making or creating it, and his representatives, although it be merely voluntary (*a*). And simply to sign a declaration of trust in favour of the donee is an effectual mode of effecting a voluntary transfer. And if a person directs by letter, though not for valuable consideration, an executor to pay over to another the share to which such person is entitled, and the letter is acted upon by the executor, it will operate as an assignment (*b*). **2336.**

A third person, particularly if a relation, may enforce in equity a stipulation made by another in his favour, and for which the party who obtained it has given a valuable consideration plainly with a view of benefiting such third person, though such third person, as regards each of the

(*a*) Story's Eq. Jur. § 433, 787, 793 a, b, 973; 1 Spence's Eq. Jur. 507; 2 Spence's Eq. Jur. 52, 57, n., 129, 254, 255, 285, 889—893, 898, 899, 907, 909—915; *Fletcher v. Fletcher*, 4 Hare 67; *Voyle v. Hughes*, 2 S. & G. 18; *Bridge v. Bridge*, 16 Beav. 315; *Weal v. Ollive*, 17 Beav. 252; *Scales v. Maude*, 6 D. M. & G. 43; *Dening v. Ware*, 22 Beav. 184; *Tatham v. Vernon*, 29 Beav. 604; *Beech v. Keep*, 1 Beav. 285; *Donaldson v. Donaldson*, 1 Kay 711; *Pearson v. Amicable Assurance Office*, 27 Beav. 229;

*Woodford v. Charnley*, 28 Beav. 96; *Dilrow v. Bone*, 3 Gif. 538; *Airey v. Hall*, 3 Sm. & G. 315; *Parnell v. Hingston*, 3 Sm. & G. 337; *Milroy v. Lord*, 4 D. F. & J. 234; *In re Breton's Estate*, *Breton v. Woollen*, 17 Ch. D. 416.

(*b*) *Kerkewich v. Manning*, 1 D. M. & G. 176; *Grant v. Grant*, 34 Beav. 34; *Gilbert v. Overton*, 2 Hem. & Mil. 110; *Jones v. Lock*, L. R. 1 Ch. Ap. 25; *Richardson v. Richardson*, L. R. 3 Eq. 686; *Lambe v. Orton*, 1 Drew. & Sm. 129.

PT. III. T. 12,  
CH. 6, s. 1.

contracting parties, may be a volunteer (*a*); as where a person who has contributed a valuable consideration to a settlement, has exacted, as part of the contract, that certain property shall be so settled as that the property, whether belonging to one of the parties or the other, shall go to some near relative, in the event of the intended limitation to the issue of the marriage failing to take effect (*b*). But it would appear, that, if the party exacting the stipulation releases the other, the stranger cannot enforce it, unless his condition in life has been altered by the stipulation (*c*). **2337.**

A grant or obligation which is voluntary, as regards the grantee or obligee, ceases to be voluntary, where, with the privity of the grantor or obligor, it forms the consideration on the faith of which a marriage is contracted and a settlement executed (*d*). **2338.**

Failure of  
the cause of  
a grant.

When the cause of a grant fails, and the thing granted is executory, the grant becomes void. Thus, if a person grants an annuity for an acre of land, or for counsel, the word "for" is conditional; and, therefore, if the land is evicted by an elder title, or if the annuitant refuses to give counsel, the annuity is determined (*e*). **2339.**

Requisites  
to a voluntary  
gift.

In every transaction in which a person obtains, by voluntary donation, a benefit from another, it is necessary, if the transaction be called in question, that he should be able to establish that the person giving him the benefit, did so voluntarily and deliberately, and with full knowledge of what he was doing. If this is not established, the transaction will be set aside (*f*). And where the circum-

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| ( <i>a</i> ) 2 Spence's Eq. Jur. 286.               | 241; <i>Anderson v. Elsworth</i> , 3 Gif.  |
| ( <i>b</i> ) 2 Spence's Eq. Jur. 281.               | 154; <i>Sharp v. Leach</i> , 31 Beav. 491; |
| ( <i>c</i> ) See 2 Spence's Eq. Jur. 280,           | <i>Toker v. Toker</i> , 31 Beav. 629;      |
| 281.  | <i>Phillipson v. Kerry</i> , 32 Beav. 628; |
| ( <i>d</i> ) <i>Payne v. Mortimer</i> , 1 Gif. 118. | <i>Lyon v. Home</i> , L. R. 6 Eq. 655;     |
| ( <i>e</i> ) 2 Pres. Shep. T. 285.                  | <i>Henry v. Armstrong</i> , L. R. 18 Ch.   |
| ( <i>f</i> ) <i>Cooke v. Lamotte</i> , 15 Beav.     | D. 668.                                    |

stances are such that the donor ought to be advised to reserve a power of revocation, it is the duty of the solicitor to the donor, or of a solicitor acting for both parties, so to advise, and in such a case, the want of such a power will, in general, in the absence of such advice, be fatal to the deed (a). It is not necessary to show that the usual clauses were explained; but any unusual clauses must be shown to have been brought to his notice, explained, and understood (b). 2340.

PT. III. T. 12,  
CH. 6, s. 1.

## II. *Inadequacy of the Consideration.*

Mere inadequacy of price, or any other inequality in the bargain, does not constitute by itself a ground to avoid it (c). But where a person obtains a conveyance at an undervalue on the faith of representations as to the value which were untrue, it will be set aside (d). And there may be such an unconscionableness or inadequacy in the bargain as to shock the conscience, and amount to conclusive evidence of imposition or undue influence; and, in such a case, Courts of Equity ought to interfere on the ground of fraud. And where there are other ingredients of a suspicious nature, gross inadequacy in the consideration must furnish the most vehement presumption of fraud (e). Such is the case if proper time for deliberation is not allowed the party injured; if he is importunately pressed; if those in whom he placed confidence make use of strong persuasion; if he is suddenly drawn into an act without being fully aware of the consequences; if he is

Where mere inadequacy of price a ground of relief.

Gross inadequacy, coupled with other grounds of relief.

(a) *Coutts v. Acworth*, L. R. 8 Eq. 558, 567; *Wollaston v. Tribe*, L. R. 9 Eq. 44; *Phillips v. Mullings*, L. R. 7 Ch. Ap. 244, 247—8; *Hall v. Hall*, L. R. 14 Eq. 365; 8 Ch. Ap. 430; *Henry v. Armstrong*, L. R. 18 Ch. D. 668.

(b) *Phillips v. Mullings*, L. R. 7 Ch. Ap. 244, 248.

(c) Story's Eq. Jur. § 244; *Abbot v. Swooner*, 4 D. G. & Sm. 448; *Harrison v. Guest*, 6 D. M. & G. 424.

(d) *Haygarth v. Wearing*, L. R. 12 Eq. 320.

(e) Story's Eq. Jur. § 246, 251. See remarks of Lord *Cranworth*, C., in *Harrison v. Guest*, 6 D. M. & G. 424.

PT. III. T. 12,  
CH. 6, s. 1.

not permitted to consult disinterested friends or counsel, before he is called upon to act, in circumstances of sudden emergency or unexpected right and acquisition; or if he is an illiterate person, and advantage has been taken of his necessities; or if he is a person of weak understanding (a). But equity will not relieve where the parties cannot be placed in statu quo. Such relief, for instance, will not be given in the case of marriage settlements; inasmuch as the Court cannot unmarry the parties (b).  
**2341.**

Inadequate  
considera-  
tion in case  
of persons  
peculiarly  
liable to be  
imposed on.

Relief will be granted, on account of the smallness of the consideration, in favour of those classes of persons, of whom, from their peculiar circumstances, irrespective of any mental incapacity, undue advantage may readily be taken, although the transaction could not be impeached if entered into by parties otherwise situated.  
**2342.** Thus,

Bargains  
with expect-  
tant heirs,  
remainder-  
men, and re-  
versioners.

Bargains with expectant heirs will be set aside, unless the party can show that a full consideration was paid, or that the bargain was fully made known to and approved by the person to whose estate the expectant heir hoped to succeed (c). But although a person seeking the benefit of a dealing with an expectant heir for his expectancy must show that he gave him a fair market price at the time of the dealing, yet he is not bound to show that he gave the full value according to the calculations of actuaries on the tables; as those calculations were made on the result of a great mass of cases, and therefore may not be a true criterion of the value of the particular case, as, for instance, where the life in question is not of average value. Besides, if the utmost value were required to be

(a) Story's Eq. Jur. § 251; *Cockell v. Taylor*, 15 Beav. 103, 115; *Longmatr v. Ledger*, 2 Gif. 157; *Clark v. Malpas*, 31 Beav. 80; *Baker v. Monk*, 33 Beav. 419.

(b) Story's Eq. Jur. § 250.

(c) See Story's Eq. Jur. § 334—340, 343; *Bromley v. Smith*, 26 Beav. 644.



given, it might altogether prevent expectants from dealing with their expectancies (a). **2343.**

PT.III. T.12,  
CH. 6, s. 1.

If, however, the heir, after being relieved from his necessities, absolutely and deliberately, and on full information as to his right of setting aside the bargain, confirms the transaction, or does any act by which the rights or property of the other party are injuriously affected, he will not be allowed to repudiate the bargain (b). **2344.**

The same relief was afforded to remaindermen and reversioners, unless the party who dealt with them could show that a full consideration was paid, or that the bargain was fully made known to and approved by their parents or other persons standing in loco parentis, who had the means of obviating the necessity for such an alienation of their future interests. **2345.**

And this doctrine applied to a charge as well as to a sale, and notwithstanding the expectant was of mature age, and fully understood the transaction. And it was not necessary to show that he was in pecuniary difficulty, for that would be assumed (c). **2346.**

By the stat. 31 Vict. c. 4 (passed 7th of December, 1867), it is enacted that "no purchase, made bonâ fide and without fraud or unfair dealing, of any reversionary interest in real or personal estate shall hereafter be opened or set aside merely on the ground of undervalue" (s. 1); and that "the word 'purchase' in this Act shall include every kind of contract, conveyance, or assignment under or by which any beneficial interest in any

(a) *Earl of Aldborough v. Trye*, 7 Cl. & F. 436.

(b) Story's Eq. Jur. § 345, 346.

(c) See Story's Eq. Jur. § 334—340; *Salter v. Bradshaw*, 26 Beav. 161; *Bromley v. Smith*, 26 Beav. 644; *St. Albyn v. Harding*, 27 Beav. 11; *Talbot v. Stanforth*, 1 Johns. &

H. 484; *Foster v. Roberts*, 29 Beav. 467; *Jones v. Ricketts*, 31 Beav. 131; *Sharp v. Leach*, 31 Beav. 491; *Perfect v. Lane*, 3 D. F. & J. 369; *Tynte v. Hodge*, 2 Hem. & Mil. 287; *Nesbitt v. Berridge*, 32 Beav. 282; *Dally v. Wonham*, 33 Beav. 154, 162.

PT. III. T. 12,  
CH. 6, s. 1.

kind of property may be acquired " (s. 2); and that " this Act shall come into operation on the first day of January, 1868, and shall not apply to any purchase concerning which any suit shall be then depending " (s. 3) (a). [But this section from the words "and shall not" to the end, is repealed by stat. 38 & 39 Vict. c. 66.] **2347.**

Post-obit  
bonds, etc.,  
by expect-  
ants.

On the principles above mentioned, post-obit bonds and other securities of the like nature are set aside, when made by heirs and other expectants. A post-obit bond is an agreement, on the receipt of money by the obligor, to pay a sum exceeding the sum so received and the ordinary interest thereof, on the death of the person upon whose decease he expects to become entitled to some property (b). Even the sale of a post-obit bond at a public auction will not give it validity, unless the sale was free, fair, and with the ordinary precautions and advertisements (c). If, however, these contracts are perfectly fair in other respects, relief will not be granted, except upon the terms of paying that to which the lender is equitably entitled (d). **2348.**

The repeal of the usury laws has not altered the course of Courts of Equity as to dealings with expectants (e). **2349.**

Bargains  
with com-  
mon sailors.

Common sailors, being a class of men so extremely generous, credulous, and improvident that they require guardianship all their lives, equity regards them in the same light as young expectant heirs; and relief is generally afforded against contracts respecting their prize money or wages, wherever any inequality appears in the bargain, or any undue advantage has been taken (f). **2350.**

(a) See *Miller v. Cook*, L. R. 10 Eq. 641; *Tyler v. Yates*, L. R. 11 Eq. 265; *Beynon v. Cook*, L. R. 10 Ch. Ap. 389; *O'Rourke v. Bolingbroke*, L. R. 2 Ap. Cas. 814.

(b) Story's Eq. Jur. § 342.

(c) Story's Eq. Jur. § 347.

(d) Story's Eq. Jur. § 344.

(e) *Croft v. Graham*, 2 D. J. & Sm. 155; *Miller v. Cook*, L. R. 10 Eq. 641, 646; *Tyler v. Yates*, L. R. 11 Eq. 265; 6 Ch. Ap. 665.

(f) Story's Eq. Jur. § 332.

Where a person, shortly after obtaining his majority, makes a gift, sale, or lease, in favour of a relative, it will be set aside, unless the grantor or lessor makes it intentionally and deliberately, after having had the fullest information on the subject, and separate, independent, and disinterested advice, even though the terms, in the case of a sale or lease, were fair, but yet not so advantageous as might have been obtained (a). 2351.

Pr.III. T.12,  
Ch. 6, s. 1.

Bargains  
between  
persons  
who have  
recently  
come of age  
and their  
relations.

### III. *Unlawfulness of the Consideration.*

Considerations which are against the principles of justice, the doctrines of morality, or the rules, provisions, or policy of the law, are utterly void; it being a rule of both law and equity that *ex turpi contractu actio non oritur* (b). Hence, a deed executed in consideration of a future cohabitation between persons who are incapable of contracting legal marriage, is invalid (c). And a bond given to a woman as the price of prostitution is void in law (d). But where a bond is given for securing an annuity or a sum of money for the support and maintenance of the person seduced, and not with any view to future cohabitation, a Court of Equity will not set it aside, even though she was a common prostitute (e). 2352.

## SECTION II.

*Of Deeds and Contracts which are Invalid on the ground of Constructive Fraud practised by Persons standing in a Confidential or Peculiar Relation to the Parties sought to be bound by such Deeds or Contracts.*

Where a reasonable confidence is reposed in another person, or a peculiar influence is possessed by him, in con-

Pr.III. T.12,  
Ch. 6, s. 2.

Construc-

(a) *Grosvenor v. Sherratt*, 28 Beav. 659.

(b) 4 Cruise T. 32, c. 2, § 51; Story's Eq. Jur. § 294—297.

(c) *Ford v. De Pontès*, 30 Beav. 572.

(d) 4 Cruise T. 32, c. 26, § 49.

(e) 4 Cruise T. 32, c. 26, s. 51, 55.

PT. III. T. 12,  
CH. 6, s. 2.

tive frauds  
by—

sequence of standing in a confidential relation, or where a person, by being employed or concerned in the affairs of another, has acquired a knowledge of his property, and he makes use of that confidence or that influence or that knowledge to obtain an advantage to himself at the expense of the party confiding in him or under his influence or in whose affairs he is concerned, he will not be permitted to retain any such advantage, however unimpeachable the transaction would otherwise have been (a).

**2353.** Thus,

1. Parents,  
and others  
in loco  
parentum,  
or relations.

1. Contracts and conveyances whereby benefits are secured by children to their parents, or to persons who stand in loco parentum, or by young persons to their relations who had an influence over them, if not entered into with scrupulous good faith, and reasonable under the circumstances, will be set aside, unless third persons have acquired an interest under them (b). In such cases, it must be proved, first, that the deed was the real and actual deed of the child or young person, and was intended by him to have the operation it has; and secondly, that that intention was fairly produced. And when a child, recently after attaining majority, makes over property to the father, without consideration, or for an inadequate consideration, equity will require the father to be able to show that the child was really a free agent, and had adequate and independent advice (c). And if an estate held in trust for a father for a life, with remainder to his son in

(a) *Sharp v. Leach*, 31 Beav. 491; *Brown v. Kennedy*, 33 Beav. 133. See also *Rhodes v. Bate*, 4 Gif. 670; L. R. 1 Ch. Ap. 252; *Tate v. Williamson*, L. R. 1 Eq. 528; 2 Ch. Ap. 55.

(b) Story's Eq. Jur. § 309; *Hoghton v. Hoghton*, 15 Beav. 278; *Espley v. Lake*, 10 Hare 260; *Wright v. Vanderplank*, 2 K. & J. 1; 8 D. M. & G. 133; *Dimsdale*

*v. Dimsdale*, 3 Drewry 556, 575. 577; *Baker v. Bradley*, 7 D. M. & G. 597, 620; *Potts v. Surr*, 34 Beav. 542; *Berdoe v. Dawson*, 34 Beav. 603; *Sercombe v. Sanders*, 34 Beav. 382; *Chambers v. Crabbe*, 34 Beav. 457; *Turner v. Collins*, L. R. 7 Ch. Ap. 329.

(c) *Savery v. King*, 5 H. L. Cas. 627, 655; *Bury v. Oppenheim*, 26 Beav. 594; *Darics v. Darics*, 4 Gif. 417.

fee, is sold by the father and son immediately on the son coming of age, and the whole purchase money is paid to the father, there, if the assistance of the Court is required by the purchaser to complete the transaction, its straightforwardness must be proved (*a*). **2354.**

Pr.III. T.12,  
Ch. 6, s. 2.

If a person seeking to impugn such transactions is not reasonably prompt in so doing, after the influence has ceased, no relief will be given, except where there is actual fraud (*b*). **2355.**

2. During the existence of guardianship, the relative situation of the parties occasions a general inability to deal with each other. And Courts of Equity will not permit transactions between guardians and wards to stand, even when they have occurred after the minority has ceased, if the intermediate period is short; especially if all the duties attached to the office have not ceased, or if the estate still remains in some sort under the control of the guardian; unless the circumstances demonstrate the fullest deliberation on the part of the ward, and the most absolute good faith on the part of the guardian (*c*). But when the guardianship has entirely ceased, and a full and fair settlement of all transactions growing out of it has been made, and a sufficient time has intervened to allow the ward to feel completely independent of the guardian; there is then no objection even to a bounty being conferred upon the latter (*d*). **2356.**

2. Guardians.

3. The same principles are applied to persons standing in the relation of quasi-guardians or confidential advisers or ministers of religion, and to every case where influence is acquired and abused, where confidence is reposed and betrayed (*e*). **2357.**

3. Quasi-guardians or advisers.

(*a*) *Hannah v. Hodgson*, 30 Beav. 19.

*v. Kennedy*, 33 Beav. 133.

(*b*) *Turner v. Collins*, L. R. 7 Ch. Ap. 329.

(*e*) Id. § 319; *Nottidge v. Prince*, 2 Gif. 246; *Smith v. Kay*, 7 H. L.

(*c*) Story's Eq. Jur. § 317—320; *Wright v. Vanderplank*, 2 K. & J. 1.

Cas. 751, 771, 778—9; *Brown v. Kennedy*, 33 Beav. 33; *Graham v.*

(*d*) Story's Eq. Jur. § 320; *Brown*

*Johnson*, L. R. 8 Eq. 86.

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Solicitors.

4. A solicitor is not incapable of contracting with his client; but, as the relation must give rise to great confidence in the solicitor, or to very strong influence over the client, the Court watches such a transaction with jealousy, and the relation must be dissolved before the contract, or the whole onus of proving the fairness and propriety of the transaction will be thrown on the solicitor, or he must show that the client had sufficient advice and assistance to relieve him from the pressure arising from the relation of solicitor and client, and that he has taken no advantage of his professional position, but that he has done as much to protect the client's interest as he would have done in the case of the client dealing with a stranger (*a*). And a solicitor who is an agent for a sale cannot become the purchaser without full explanation to the parties interested of all the circumstances of the sale and of the value of the property; because his duty and his interest are in conflict (*b*). And if a solicitor can show that he is entitled to purchase, yet if, instead of openly purchasing, he purchases in the name of a trustee or agent, without disclosing the fact, no such purchase can stand (*c*). And in the case of a solicitor taking a security or a purchase from his client, it is incumbent on the solicitor to prove the advance of the money to the client by some other evidence than the deed of security or purchase (*d*). **2358.**

As a general rule, a solicitor shall not accept a gift,

(*a*) See Sugd. Concise View, 548; Story's Eq. Jur. § 310—313; *Holman v. Loynes*, 4 D. M. & G. 270; *Tomson v. Judge*, 3 Drewry 306; *Savery v. King*, 5 H. L. Cas. 627, 655—6; *Waters v. Thorn*, 22 Beav. 547; *Spencer v. Topham*, Id. 573; *Cowdry v. Day*, 1 Gif. 316; *Gresley v. Mousley*, 1 Gif. 450; 4 D. & J. 78; *Pearson v. Benson*, 28 Beav.

598; *Gibbs v. Daniel*, 4 Gif. 1; *Pisani v. Att.-Gen. for Gibraltar*, L. R. 5 P. C. 517.

(*b*) *In re Bloyes' Trust*, 1 Mac. & G. 494, 497.

(*c*) *Lewis v. Hillman*, 3 H. L. Cas. 630. See remarks on Agents, *infra*, par. 2862.

(*d*) *Gresley v. Mousley*, 3 D. F. & J. 433, 444.

or, in any way whatever, in respect of the subject of any transaction between him and his client, make a gain to himself at the expense of his client, beyond the amount of the just and fair professional remuneration to which he is entitled (a). It is a long-established rule, requisite for the safety of society, that, while the relation of solicitor and client subsists, the solicitor cannot take a gift from his client. If the relation has ever subsisted, it must, in the first place, be severed; and then some independent advice should be obtained by the donor (b). On the above principle, an agreement on the part of a client to allow a solicitor a commission of so much per cent. on a fund in Court, as a remuneration for recovering the fund or employing another solicitor to recover it, was void, as contrary to the policy of the law (c). And an agreement by a client to allow his solicitor interest on his bill of costs, could not be maintained—at all events, not unless the solicitor informed the client that the law allowed no such charge, or the client acquiesced, after the termination of the relation, and after proper advice upon the subject (d). But a deed executed by a client in favour of his solicitor, if voidable, may be confirmed by the will of the client (e).

**2359.**

An agreement between a solicitor and client, that a gross sum shall be paid for costs for business already done, is valid. But an agreement to pay a gross sum for business hereafter to be done was void. And if a solicitor takes a gross sum for his services, without an

(a) 4 Cruise T. 32, c. 26, § 35; Story's Eq. Jur. § 312; *Moss v. Bainbrigge*, 18 Beav. 478; 6 D. M. & G. 292; *Tomson v. Judge*, 3 Drewry 306; *Re Holmes's Estate*, 3 Gif. 337; *Nanney v. Williams*, 22 Beav. 452; *Walker v. Smith*, 29 Beav. 394; *Bank of London v. Tyrrell*, and *Tyrrell v. Bank of*

*London*, 27 Beav. 273; 10 H. L. Cas. 26; *O'Brien v. Lewis*, 4 Gif. 221.

(b) *Morgan v. Minett*, L. R. 6 Ch. D. 638.

(c) *Strange v. Brennon*, 15 Sim. 346.

(d) *Lyddon v. Moss*, 4 D. & J. 104.

(e) *Stump v Gaby*, 2 D. M. & G.

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account, he should preserve evidence of the fairness of the agreement, and that the client had good advice, or had full opportunity and capacity to judge for himself (a). **2360.**

These paragraphs must be read subject to the stat. 33 & 34 Vict. c. 28, [and also subject to the provisions of the stat. 44 & 45 Vict. c. 44, and the solicitors' remuneration orders made under that statute.] **2360a.**

If a solicitor and mortgagee obtains a conveyance from the mortgagor, and the mortgagor is a man in humble circumstances, without any legal advice, the onus of justifying the transaction and showing that it was a right and fair transaction is thrown upon the mortgagee (b). **2360b.**

5. Doctors.

5. Similar rules apply to the case of a medical adviser and his patient (c). **2361.**

6. Agents.

6. An agent will not be permitted to reap any advantage by becoming secret vendor or purchaser of property which he is authorised to buy or sell for his principal (d). So that if an agent sells his own property to his principal as the property of another, without disclosing the fact, or if an agent purchases the goods of his principal in another name, however fair the transaction may be, the principal may either repudiate it, or may claim any profit made by the agent; because an agent will not be allowed to place himself in a situation which, under ordinary circumstances, would tempt a man to do that which is not the best for the principal (e). And if an agent employed to purchase for another purchases for himself, he will be considered as the trustee of his employer, at the option

631. But see *Waters v. Thorn*, 22 Beav. 547, 559.

(a) *Re Newman*, 30 Beav. 196; *Morgan v. Higgins*, 1 Gif. 277.

(b) *Prees v. Coke*, L. R. 6 Ch. Ap. 645, 649.

(c) Story's Eq. Jur. § 314.

(d) Story's Eq. Jur. § 315.

(e) *Bentley v. Craven*, 18 Beav. 76. See also *Bank of London v. Tyrrell*, 27 Beav. 273; *Tyrrell v. Bank of London*, 10 H. L. Cas. 26.



of the latter (a). And in all transactions directly and openly entered into between principal and agent, the utmost good faith is required; so that the agent must not conceal any facts within his knowledge which might influence the judgment of his principal as to price or value (b). **2362.**

7. A trustee is not allowed to partake of the bounty of the party for whom he acts, except under circumstances which would make the same valid if it were a case of guardianship (c). **2363.**

Trustees, mortgagees, and executors, with powers of sale, cannot buy the trust estate from themselves, or in other words they cannot sell it to themselves; for although they may vest the estate by conveyance in themselves as purchasers, or in a nominal purchaser as a trustee for them, yet equity would not allow such a purchase to stand, unless it should prove beneficial to the cestui que trust (d). And if a purchase is made of a trust estate, from the cestui que trust, by a trustee (not being only a formal or nominal trustee, such as a trustee to support contingent remainders), although the purchase be at a public auction, unless there has been no fraud, concealment, or advantage on the part of the trustee, and no want of protection and security on the part of the cestui que trust, the cestui que trust may require a reconveyance or a resale; and if the resale produces more than the trustee gave, the cestui que trust may repudiate the first sale, and adopt the resale; if less, he may affirm the first sale (e). And a trustee for a person not sui

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7. Trustees or other persons who from their office or employment have acquired a knowledge of the property.

(a) Story's Eq. Jur. § 316, 1211a; Sugd. Concise View, 545; *Kimber v. Barber*, L. R. 8 Ch. Ap. 56.

(b) Story's Eq. Jur. § 315, 316a; *Dally v. Wonham*, 33 Beav. 154.

(c) Story's Eq. Jur. § 321—2.

(d) Sugd. Concise View, 48, 547; and dictum of M. R. in *Denton v.*

*Donner*, 23 Beav. 290; *Hickley v. Hickley*, L. R. 2 Ch. D. 190.

(e) Sugd. V. & P. 14th ed. 69, 691—4; Lewin on Trusts, 4th ed. 335, 342; St. § 322; 2 Sp. 943—4; *Smedley v. Varley*, 23 Beav. 358; *Denton v. Donner*, Id. 285; *Luff v. Lord*, 34 Beav. 220.

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CH. 6, S. 2. juris can only buy the estate under the authority of the Court (a). **2364.**

On similar principles, agents, commissioners of bankrupts, trustees, and solicitors of bankrupts' and insolvents' estates, or their partners in business, auctioneers, creditors who have been consulted as to the mode of sale, counsel, or any persons who by being employed or concerned in the affairs of another have acquired a knowledge of his property, even though the bargain be perfectly fair, are incapable of purchasing such property, except under similar restrictions (b). And where a trustee or agent agrees to accept a benefit from an intended purchaser, the purchase cannot be maintained (c). **2365.**

Where a person cannot purchase the estate himself, he cannot buy it as agent for another. So, if a person is disabled from purchasing, his solicitor or agent in the transaction is equally disabled, although for his own benefit (d). The circumstance, however, that two parties stand to each other in the relation of trustee and cestui que trust, does not affect any dealing between them unconnected with the subject of the trust (e). **2366.**

Purchases  
by mortga-  
gees and

A sale by a mortgagor to a mortgagee does not stand upon the principle of a sale by a cestui que trust to his trustee, but on the same principle as a sale between parties having no connection with each other; for otherwise it might be impossible for the mortgagor ever to get rid of his debt by releasing the equity of redemption (f). But if the mortgagee takes a conveyance with a power

(a) Sugd. Concise View, 548.

(b) See Story's Eq. Jur. § 322; 2 Spence's Eq. Jur. 943—4; Sugd. Concise View, 543—4; *Pooley v. Quilter*, 2 D. & J. 327.

(c) Sugd. Concise View, 545.

(d) Sugd. Concise View, 546.

(e) *Knight v. Majoribanks*, 2 Mac. & G. 10.

(f) *Knight v. Majoribanks*, 2 Mac. & G. 10; Sugd. Concise View, 545.

of sale, he is a trustee for sale, and as such disabled from purchasing (a). **2367.** Pt. III. T. 12, Ch. 6, s. 2.

A creditor who has taken out execution, may buy the estate sold under the execution (b). **2368.** Creditors.

It may here be remarked, that where a power is given by a settlement to trustees to sell or exchange the estate with the consent of the tenant for life, or to the tenant for life to sell or exchange with the consent of the trustees, the estate may be safely purchased by the tenant for life himself, or taken in exchange for land of his own (c). **2369.** Purchases or exchanges by tenant for life.

### SECTION III.

#### *Of Deeds which are invalid on account of Actual or Constructive Fraud on Third Persons.*

An instrument may be entirely set aside on the ground of fraud (d), whether actual or constructive; so that contracts which operate as a virtual fraud upon third persons are invalid. **2370.** Thus, P. III. T. 12, Ch. 6, s. 3.

I. If clandestine marriage contracts are designed to impose on parents or persons standing in loco parentis or in some other peculiar relation to the parties, so as to disappoint their bounty, or to defeat their intentions in the disposition of their property, such contracts will be set aside, or the equities will be held to be the same as if they had not been entered into (e). **2371.** I. Clandestine marriage contracts.

II. So, relief will be granted to the injured parties, where persons, after doing acts required to be done on a treaty of marriage, render those acts virtually unavailing II. Frauds on marriages.

(a) Sugd. Concise View, 545—6.

v. *Talbot*, L. R. 6 Ch. Ap. 32.

(b) Sugd. Concise View, 545.

(d) See Story's Eq. Jur. § 161.

(c) 2 Sugd. Pow. 492; Sugd. Concise View, 546, 549; *Dicconson*

(e) See Story's Eq. Jur. § 275.

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by entering into other secret agreements, or derogate from those acts, or otherwise commit a fraud upon a marriage (*a*). As where a parent declines to consent to a marriage on account of the intended husband being in debt, and the brother of the latter gives a bond for the debts to procure such consent, and the intended husband then gives a secret counter-bond to his brother to indemnify him against the first (*b*). So where a brother, on the marriage of his sister, let her have a sum of money privately, that her fortune might appear to be as much as was insisted on, and the sister gave a bond to the brother to secure the repayment thereof, the bond was set aside (*c*). So where, upon a treaty of marriage, a creditor of the intended husband concealed his own debt, and misrepresented to the wife's father the amount of the husband's debts, the transaction was treated as a fraud upon the marriage, and the creditor was prevented from enforcing his debt (*d*). And where a father, on the marriage of his daughter, enters into a covenant, that, on his death, he will leave her a full and equal share of all his personal estate, he cannot afterwards transfer a portion of his personal property to another child, retaining the annual income thereof for his life (*e*). **2372.**

III. Relief will also be granted against acts secretly done by a woman in contravention of the marital rights, or in disappointment of the just expectations of her intended husband. As where a woman, in contemplation of marriage, and without the privity of her intended husband, makes a settlement to her separate use, or a conveyance in favour of persons for whom she is under no moral obligation to provide. But a reasonable provision for her children by a former marriage, under

(*a*) Story's Eq. Jur. § 268—272.

(*b*) Story's Eq. Jur. § 269.

(*c*) Story's Eq. Jur. § 270.

(*d*) Story's Eq. Jur. § 271.

(*e*) Story's Eq. Jur. § 382.

circumstances of good faith, is free from objection (a). PT. III. T. 12, CH. 6, s. 8.  
**2373.**

IV. By the stat. 3 Hen. 7, c. 4, all deeds of gifts of goods made in trust to the use of the donor, shall be void; because otherwise persons might be tempted to commit treason or felony without danger of forfeiture, and the creditors might also be defrauded of their rights (b). **2374.** IV. Deeds of gift of goods in trust for the use of the donor.

V. By the stat. 13 Eliz. c. 5, s. 1 (made perpetual by the stat. 29 Eliz. c. 5), "for the avoiding of feigned covinous, and fraudulent feoffments," etc., "contrived of malice, fraud, covin, collusion, or guile," to "delay, hinder, or defraud creditors or others," it is enacted, that "all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels, or of any of them, or of any lease, rent, common, or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment, and execution, at any time had or made since the beginning of the Queen's Majesty's reign that now is, or at any time hereafter to be had or made, to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, by such guileful, covinous, or fraudulent devices and practices, as is aforesaid, are, shall, or might be in any ways disturbed, hindered, delayed, or defrauded), to be clearly and utterly void, frustrate, and of none effect; V. Voluntary deeds void under stat. 13 Eliz. c. 5.

(a) Story's Eq. Jur. § 273; 2 Spence's Eq. Jur. 505; *Countess of Strathmore v. Bowes*, 1 Lead. Cas. Eq. 2nd ed. 325 et seq.; *Prideaux v. Lonsdale*, 4 Gif. 159; 1 D. J. & Sm. 433; *Downes v. Jennings*, 32 Beav. 290.  
 (b) 2 Bl. Com. 441.

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any pretence, colour, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding." But, by s. 5, it is provided "that this Act, or anything therein contained, shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods or chattels, had, made, conveyed or assured, or hereafter to be had, made, conveyed or assured, which estate or interest is or shall be upon good consideration and bonâ fide lawfully conveyed or assured to any person or persons, or bodies politic or corporate, not having at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such covin, fraud, or collusion as is aforesaid." **2375.**

In consequence of this statute, deeds, though good as between the parties and in other respects, are void as against creditors, when made with an actual intent to defraud them (*a*), even though such deeds be for valuable consideration (*b*), except as regards a bonâ fide purchaser from the debtor or from an assignee of the debtor without notice of the circumstances amounting to such actual fraud. But it is not at all necessary to show any actual fraud in intent: if the transaction must have the effect of "disturbing, hindering, delaying, or defrauding" creditors, the Court will presume the intention. And if a person makes a conveyance or assignment of any real or personal property which is liable to his debts (unless it is to a purchaser for valuable consideration who has no notice of a fraudulent intent), and at the time, or soon afterwards, he is deeply indebted to such an amount that he has not ample means besides that property available to pay the debts, without his creditors being delayed or hindered,

(*a*) 4 Cruise T. 32, c. 27, § 4;  
*Shee v. French*, 3 Drewry 717;  
*Bessy v. Windham*, 6 Ad. & El.  
(N. S.) 166.

(*b*) 4 Cruise T. 32, c. 27, § 4;  
*Strong v. Strong*, 18 Beav. 408;  
*Bott v. Smith*, 21 Beav. 511; *Wells*  
*v. Gardner*, L. R. 7 Eq. 317.

such conveyance or assignment is void as against those who were creditors at the time of and subsequent to the deed, to the extent to which it may be necessary to deal with the property for their satisfaction (a). A deed, however, which is apparently voluntary, may be shown by extrinsic evidence to have been made for valuable consideration, and may be supported as such against creditors (b). And a deed is not necessarily void under this Act, merely because designed to prefer or defeat a particular creditor (c). **2376.**

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A man who contemplates going into trade, cannot, on the eve of doing so, take the bulk of his property out of the reach of those who may become his creditors in the trading operations. So that a voluntary settlement, whereby a settlor takes the bulk of his property out of the reach of his creditors shortly before engaging in trade of a hazardous character, or of which he has little or no knowledge, may be set aside, in a suit on behalf of creditors who became such even after the settlement (d).

(a) See Story's Eq. Jur. § 352—374, 381; 2 Spence's Eq. Jur. 887; 4 Cruise T. 32, c. 27, § 15—17; Coote Mortg. 3rd ed. 238; 2 Bl. Com. 441; 1 Pres. Shep. T. 66; Add. Cont. 6th ed. 149—156; *Twyne's case*, 3 Co. 80; Chit. Con. 8th ed. 380 et seq.; *Skarf v. Soulby*, 1 Mac. & G. 364; *Re Maganley's Trust*, 5 De G. & S. 1; *Bott v. Smith*, 21 Beav. 511; *Barton v. Vanheythuysen*, 11 Hare 126; *Denning v. Ware*, 22 Beav. 184; *Holmes v. Penney*, 3 K. & J. 90; *Turnley v. Hooper*, 3 Sm. & G. 249; *Darville v. Terry*, 6 Hurl. & Norm. 807; *Thompson v. Webster*, 4 Drew. 628; 4 D. & J. 600; *Acraman v. Corbett*, 1 Johns. & Hem. 410; *Barling v. Bishopp*, 29 Beav. 417; *Stokoe v. Cowan*, 29 Beav. 637; *Spirett v. Willows*, 3 D. J. & S. 293; *Smith v. Cherrill*, L. R. 4 Eq. 390;

*Reese River Silver Mining Company v. Atwell*, L. R. 7 Eq. 347; *Freeman v. Pope*, L. R. 9 Eq. 206; 5 Ch. Ap. 538; *Allen v. Bonnett*, L. R. 5 Ch. Ap. 577; *Crossley v. Elworthy*, L. R. 12 Eq. 158; *Mackay v. Douglas*, L. R. 14 Eq. 106; *Cornish v. Clark*, L. R. 14 Eq. 184; *Kent v. Riley*, L. R. 14 Eq. 190; *Taylor v. Coenen*, L. R. 1 Ch. D. 636; *Spencer v. Slater*, L. R. 4 Q. B. D. 13; *Boldero v. London and Westminster Loan, etc., Co.*, L. R. 5 Ex. D. 47.

(b) *Pott v. Todhunter*, 2 Coll. 76.

(c) Ad. Cont. 6th ed. 151; Chit. Cont. 8th ed. 383; *Alton v. Harrison*, L. R. 4 Ch. Ap. 622. See *infra*, par. 2381, note (a).

(d) *Mackay v. Douglas*, L. R. 14 Eq. 106; *Ex parte Russell, In re Butternorth*, 19 Ch. D. (Ap.) 588.

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And a trader cannot, by covenants in a post-nuptial settlement or even a pre-nuptial settlement, withdraw from his creditors future property which he may acquire, though he may be solvent at the date of the settlement (a). **2377.**

As regards the rights of creditors with respect to conveyances and assignments to their prejudice, there may be three distinct questions: (1) Whether they are acts of bankruptcy? (2) Whether they are fraudulent preferences, which, when not prohibited by statute, were held to be void as against the assignees in bankruptcy, as contrary to the policy of the bankrupt law? (3) Whether they are void under the statute of 13 Eliz. c. 5, and the construction put on it by the Courts of Law and Equity? **2378.**

Now with reference to the third of these questions, Judge Story, in his "Commentaries on Equity Jurisprudence," § 352, remarks that this Act "has always received a favourable and liberal construction in all Courts, both of Law and Equity." And the only true principle would seem to be that where a conveyance or assignment is made for no consideration, or (unless *bonâ fide*) only for an antecedent debt or a meritorious consideration or even for a valuable consideration, but with a knowledge on the part of the purchaser of an intent to delay, hinder, or defraud creditors, and it withdraws from the debtor the means of paying the general body of his creditors, it is void, as against them by virtue of the stat. 13 Eliz. c. 5, whether made under pressure or not, and whether made in contemplation of bankruptcy or not. To hold otherwise, would open a door to innumerable frauds on creditors, especially in the case of assignments of all a debtor's property, and more particularly when made to a relative or friend. A debtor might incur a number of debts, to any amount, and yet defeat all but a particular creditor, perhaps a relative

(a) *Ex parte Bolland, In re Clint*, L. R. 17 Eq. 115.



or friend, with whom he might have an understanding that he should receive part back, or that the property should be held in trust for him. **2379.**

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Where a debtor gives a bill of sale or makes some other disposition of all his property, it is very different from the case where a creditor gets a judgment in an adverse suit, having the same effect of taking all the debtor's property. In the former case, the bill of sale or other disposition, if not the voluntary act of the debtor, is an act in which the debtor concurs, though it may be under pressure : it is his own act. But in the latter case, the act is the act of the creditor, which the debtor cannot avoid. **2380.**

To take a case out of the statute, it must be both "on good consideration" and "bonâ fide." It has indeed been held that an antecedent debt or a meritorious consideration may be a good "consideration." And a preference of a particular creditor may, under some circumstances, be only right ; while, on the other hand, the defeating a particular creditor may be for the benefit of the general body or the majority of the creditors. But it cannot be justly regarded as a bonâ fide transaction, where a debtor makes over all his property to a particular creditor and thereby disables himself from paying any of the others (a). Suppose a man having £100,000, and owing that amount to one creditor, and £900,000 to others : could it be anything else but the grossest dishonesty and fraud upon them, if he were to make over the whole £100,000 to the creditor to whom he owed that amount ? and this would be especially bad, if the property consisted of chattels, and if, though he assigned them to the first creditor, he remained in possession of

(a) The last two sentences of the judgment of *Giffard*, L. J., in *Alton v. Harrison*, L. R. 4 Ch. Ap. 626, appear to the writer to require qualification. Taken generally, he considers them quite unsound.

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the chattels, and thereby may have led the subsequent creditors to suppose that he was the owner of them, in consequence of which they may have been induced to trust him. True it is, that they might have searched the register. But the fact of registration does not validate a transaction which, of itself, is invalid, or fraudulent, whether actually or constructively. It may be said of registration, that the deed would not be valid as against creditors without it; but the deed may not be valid even with it. **2381.**

In order to be obnoxious to the statute, it is not necessary that there should be a wilful, otherwise called an actual, fraud. It is sufficient if there is a virtual or constructive fraud. The question is this—Is it within the mischief intended to be guarded against by the Act? Does it necessarily operate to delay, hinder, or defeat creditors, in a manner which the law deems to be contrary to good faith? **2382.**

It is for the plaintiff to make out his case; and, in inter-pleader cases, the claimant, under a bill of sale or other disposition, is in the situation of a plaintiff. He seeks to deprive the judgment creditor of the possession which he has acquired under the judgment. On the claimant, therefore, is the onus of proving his title, as claimant and virtual plaintiff, to property not in his possession, but in the possession of the officer of the Court, as the agent of the judgment creditor. It is for the claimant to prove that the bill of sale or other disposition is both on valuable or good consideration, and bonâ fide, without notice of circumstances amounting to actual or constructive fraud. **2383.**

It has been held that a creditor under a voluntary post-obit bond is as much entitled to the benefit of the statute as any other creditor (*a*). **2384.**

(*a*) *Adames v. Hallett*, L. R. 6 Eq. 468.

If there is a positive agreement, that after a settlement, a sale, or a mortgage of chattels, the settlor, vendor, or mortgagor shall retain the apparent ownership of them; this is a fraud on creditors, because it enables him to gain a false credit. But this doctrine does not apply where the retaining the possession is consistent with the nature of the transaction, and does not appear to have been fraudulent, or where the transfer is so notorious that the continuance of possession does not create any false credit, or where the settlor, vendor, or mortgagor is not indebted at the time (a). **2385.**

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A bill of sale of all the grantor's then existing and after-acquired property, by way of mortgage, to secure an existing debt and future advances is not void under the stat. 13 Eliz. c. 5, if it is made bonâ fide, and not as a cloak for retaining possession by the grantor (b). **2385a.**

If a trader in insolvent circumstances agrees to sell his business and stock in trade to a person who has no knowledge of the state of the trader's affairs, in consideration of (inter alia) an annuity to his wife, although the sale is valid, yet the transaction, so far as it is a settlement of the annuity on the wife, is within the stat. 13 Eliz. c. 5, and may be set aside by a creditor, as regards the annuity, without impeaching it in any other respect (c). **2386.**

If a father assigns to his son his dwelling house and personal estate, in consideration of natural love and affection, and by a bond, bearing even date with the assignment, but not noticed therein, the son binds himself to maintain his father's wife and children, the assignment is not void against creditors under the stat. 13 Eliz. c. 5 (d). **2387.**

(a) Coote Mortg. 3rd ed. 239; Add. Cont. 5th ed. 153—7; *Gale v. Burnell*, 7 Ad. & El. (N. S.) 850; *Ex parte Games, In re Bamford*, L. R. 12 Ch. D. (Ap.) 314.

(b) *Ex parte Games, In re*

*Bamford*, L. R. 12 Ch. D. (Ap.) 314.

(c) *French v. French*, 6 D. M. & G. 95. See *Wakefield v. Gibbon*, 1 Gif. 401.

(d) *Gale v. Williamson*, 8 M. & W. 405.

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As a general rule, a post-nuptial settlement by a husband deeply indebted at the time, is void as against creditors, even though made in pursuance of a pre-nuptial parol contract; for such a contract is inoperative in consequence of the Statute of Frauds, 29 Car. 2, c. 3, s. 4 (a). But if a person agrees to pay all the debts of another, on condition that the latter shall make a post-nuptial settlement of his property so as to be applied for the maintenance of the settlor, his wife, and children, "or any of them," at the absolute discretion of the trustees; and such a settlement is accordingly executed; it is good against subsequent creditors, and even against a person who was a creditor at the time it was executed, if the person who agrees to pay the settlor's debts was not aware of the existence of the debt due to that creditor, but was assured that the debts paid by him constituted the only debts of the settlor. And in such case, the discretion of the trustees being absolute, the Court cannot apportion the income of the settlor between his wife and children, so as to make the settlor's part of it available for his creditors (b). 2388.

The burden of proving his solvency at the time rests upon the settlor (c). 2388a.

If a voluntary settlement contains a general power to the settlor to dispose of or mortgage the estate, it will be deemed fraudulent as against creditors by statute and judgment; but a power to revoke for a particular purpose may not make such a deed void (d). 2389.

Unless the marriage itself was a mere fraudulent contrivance for defeating creditors, a settlement of the husband's property made previously to and in contempla-

(a) *Warden v. Jones*, 23 Beav. 87; 2 D. & J. 76; *Bulmer v. Hunter*, L. R. 8 Eq. 46; and see *supra*, par. 1695, 1696; *Crossley v. Elworthy*, L. R. 12 Eq. 158.

(b) *Holmes v. Penney*, 3 K. & J. 90.

(c) *Crossley v. Elworthy*, L. R. 12 Eq. 158.

(d) 2 Sugd. Pow. 234.

tion of the marriage, will be supported so far as concerned the interests of the wife and children, even though the wife contracted the marriage and obtained the settlement with a full knowledge that the husband was in embarrassed circumstances (a). 2390.

VI. By the stat. 27 Eliz. c. 4, s. 1 (made perpetual by the stat. 30 Eliz. c. 18), it is enacted, "That all and every conveyance, grant, charge, lease, estate, incumbrance and limitation of use or uses, of, in, or out of any lands, tenements, or other hereditaments whatsoever, had or made any time heretofore sithence the beginning of the Queen's Majesty's reign that now is, or at any time hereafter to be had or made, for the intent and of purpose to defraud and deceive such person or persons, bodies politic or corporate, as have purchased or shall afterwards purchase in fee simple, fee tail, for life, lives, or years, the same lands, tenements, and hereditaments, or any part or parcel thereof so formerly conveyed, granted, leased, charged, incumbered, or limited in use, or to defraud and deceive such as have or shall purchase any rent, profit, or commodity in or out of the same or any part thereof, shall be deemed and taken (only as against that person and persons, bodies politic and corporate, his and their heirs, successors, executors, administrators, and assigns, and against all and every other person and persons lawfully having or claiming by, from or under them or any of them, which have purchased or shall hereafter so purchase for money or other good consideration, the same lands, tenements, or hereditaments, or any part or parcel thereof, or any rent, profit, or commodity in or out of the same), to be utterly void, frustrate, and of none effect; any pretence, colour, feigned consideration, or expressing of any use or uses to the contrary notwith-

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VI. Voluntary deeds void under the stat. 27 Eliz. c. 4, ss. 1, 4.

(a) *Colombine v. Penhall*, 1 Sm. Gif. 49, 62; and see *Kevan v. & G.* 228; *Fraser v. Thompson*, 1 *Crawford*, L. R. 6 Ch. D. (Ap.) 29.

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standing." But by s. 4, it is provided "That this Act or anything therein contained shall not extend or be construed to impeach, defeat, make void, or frustrate any conveyance, assignment of lease, assurance, grant, charge, lease, estate, interest, or limitation of use or uses, of, in, to, or out of any lands, tenements, or hereditaments heretofore at any time had or made, or hereafter to be had or made, upon or for good consideration and bonâ fide, to any person or persons, bodies politic or corporate; anything before mentioned to the contrary hereof notwithstanding." 2391.

The object of this statute being to give full protection to subsequent purchasers against prior voluntary conveyances, it has been decided, that in consequence of this statute, a prior conveyance is void as against a subsequent purchaser or mortgagee, from or of the voluntary grantor, whether with or without notice (but not from or of his heir or devisee), and even after proceedings to enforce such prior conveyance, if not actually on valuable consideration, although it may be bonâ fide and on good consideration, or although it may be expressed to be made for divers valuable considerations (not naming them), or although made by direction of a Court of Equity; on the ground that the statute in every such case infers fraud, and will not suffer the presumption to be rebutted. As between the parties themselves, however, such conveyances are binding. And when a voluntary settlement has been made, subsequent judgment creditors of the settlor cannot acquire rights in derogation of it which the settlor would not have possessed. And as between two voluntary conveyances, if the first is fraudulent, the second will prevail; but where each is bonâ fide, equity will not interfere (a). A conveyance in the form of a purchase

(a) Story's Eq. Jur. § 425, 426, 433; 2 Spence's Eq. Jur. 288, 638; 4 Cruise T. 32, c. 27, § 9, 12, 21, 23, 26, 29, 44, 47, 49; Sugd. Concise

deed for valuable consideration, but, in fact, voluntary, PT. III. T. 12,  
CH. 6, S. 3. will not be supported against a prior voluntary conveyance by the same party, even though the prior voluntary conveyance did not appear to have been parted with or communicated to the voluntary grantee (*a*). And where the price is inadequate in a considerable degree, or where an apparent inadequacy of price is coupled with other circumstances indicating a fraudulent collusion between the purchaser and the vendor to avoid a preceding conveyance, a purchaser under such circumstances will not be entitled to the protection of the statute (*b*). Nor will equity interfere in favour of a subsequent purchaser, where the voluntary grantee has conveyed to a bonâ fide purchaser for valuable consideration, or a person has intermarried with the voluntary grantee on the faith of the voluntary deed, before the bonâ fide purchaser from the voluntary grantor acquired his title (*c*). And equity will not give its aid to a voluntary settlor to enable him to complete a contract for sale against a purchaser; though the Court will enforce it at the suit of the purchaser, even with notice at the time of his purchase (*d*). **2392.**

The law that a man who has executed a voluntary settlement is enabled to sell the estate, just as if he had done nothing, is highly unreasonable. And the Court

View, 565—6; Burton, § 224—5; *Kelson v. Kelson*, 10 Hare 385; *Doe d. Newman v. Rusham*, 17 Ad. & E. 724; *Barton v. Vanheythuysen*, 11 Hare 126; *Lewis v. Rees*, 3 K. & J. 132, 150—1; *Lloyd v. Attwood*, 3 D. & J. 614; *Dolphin v. Aylward*, L. R. 4 H. L. 486; *Rosher v. Williams*, L. R. 20 Eq. 210; *Daking v. Whimper*, 26 Beav. 568. In this case it was held that the volunteers had no equity against the purchase money payable to the voluntary settlor. The propriety of this decision seems questionable.

(*a*) *Roberts v. Williams*, 4 Hare 130.

(*b*) 4 Cruise T. 32, c. 27, § 42; 2 Sugd. Pow. 228.

(*c*) For examples of the mode of relief in cases of fraud, see Story's Eq. Jur. § 437—439; Id. § 434; Sugd. Concise View, 569; 1 Pres. Shep. T. 65.

(*d*) Sugd. Concise View, 570; 2 Spence's Eq. Jur. 289; 4 Cruise T. 32, c. 27, § 29; 1 Pres. Shep. T. 65; *Clarke v. Willott*, L. R. 7 Ex. 313; V.-C. Malins in *Rosher v. Williams*, L. R. 20 Eq. 218.

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will lay hold of any circumstances constituting a consideration moving from the grantee to the grantor, to take a case out of the category of voluntary deeds (*a*).  
**2393.**

The assignment of leasehold property to which liability is attached is not a voluntary deed, but is, in itself, a conveyance for valuable consideration (*b*).  
**2393a.**

Gifts to charity.

There is this exception to the general rule, in the case of a charity, that if a purchaser has notice of a gift to a charitable use, or purchases without notice from a purchaser with notice of such a gift, he takes subject to it; though, if he has no notice, and he has not purchased from a purchaser with notice, he will have the same protection as he would have against an ordinary voluntary conveyance (*c*). **2394.**

Where persons claiming under a settlement stand in the position of purchasers.

A fair voluntary settlement in favour of a wife and children is also an exception to the rule to this extent, that almost any bonâ fide consideration, in addition to the meritorious consideration of the provision itself, will be sufficient for the purpose of supporting the settlement. Therefore, if a person whose concurrence the parties deem essential joins in a settlement, his concurrence will be deemed a valuable consideration, although he did not substantially part with anything (*d*). And as to pre-nuptial settlements, and post-nuptial settlements in pursuance of pre-nuptial articles or on receipt of an additional portion, or on which the husband and wife, having interests, gave up something, they are settlements for valuable consideration, and of course good against subsequent

(*a*) V.-C. *Malins*, in *Rosher v. Williams*, L. R. 20 Eq. 218.

(*b*) *Price v. Jenkins*, L. R. 5 Ch. D. (Ap.) 619.

(*c*) 2 Spence's Eq. Jur. 289; Tudor's Char. Trusts, 2nd ed. 329—332.

(*d*) See 2 Spence's Eq. Jur. 288, 290; 4 Cruise T. 32, c. 27, § 23, 73; Sugd. Concise View, 568—9; *Butterfield v. Heath*, 15 Beav. 408; *Atkinson v. Smith*, 3 D. & J. 186; *Teasdale v. Braithwaite*, L. R. 4 Ch. D. 85.



purchasers (a), or against prior voluntary grantees, as the case may be (b). **2395.**

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In general, the marriage consideration will not extend to remainders to collateral relations, so as to support them against creditors, or a subsequent sale to a bonâ fide purchaser (c). But if the remainders are, or may fairly be assumed to have been, specifically contracted for and brought within the consideration, they will be good against subsequent purchasers. And the same is the case where they are interposed between two limitations to the different classes of the issue of the marriage (d). And where a settlement is made by a father or other lineal ancestor, in consideration of the marriage of one of his sons or descendants, and it contains remainders to the other sons or descendants, such remainders will be good against creditors and subsequent purchasers (e). **2396.**

A lessee, or a mortgagee, or any other person who for a valuable consideration has any charge out of or upon the land, is a purchaser within the statute (f). But notwithstanding the stat. 1 & 2 Vict. c. 110, s. 13 (g), a judgment creditor is not a purchaser within the stat. 27 Eliz. c. 4, so as to be able to set aside a prior voluntary settlement (h). **2397.**

Other persons who are purchasers for valuable consideration within the statute.

A conveyance for payment of debts generally, to which no creditor is a party, and in which no particular debt is expressed, is a fraudulent conveyance within the statute (i). **2398.**

(a) 2 Sugd. Pow. 229; Sugd. Concise View, 568; 4 Cruise T. 32, c. 27, § 55; *In re Foster and Lister*, L. R. 6 Ch. D. 87.

*Clarke v. Wright*, 5 Hurl. & Norm. 401; 6 Id. 849.

(e) See 4 Cruise T. 32, c. 27, § 67—71.

(b) 4 Cruise T. 32, c. 27, § 43, 57.

(f) 2 Sugd. Pow. 228.

(g) *Supra*, par. 1156.

(c) Sugd. Concise View, 567; 2 Spence's Eq. Jur. 291—293; *Smith v. Cherrill*, L. R. 4 Eq. 390.

(h) *Beavan v. Earl of Oxford*, 6 D. M. & G. 507.

(i) 2 Spence's Eq. Jur. 351. See also Burton, § 223.

(d) Sugd. Concise View, 567;

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Objection to  
title from a  
person who  
has made a  
prior con-  
veyance.

It is seldom advisable to buy from one who has made a prior conveyance ; because, in the first place, such prior conveyance may in reality have been for a valuable consideration, though none appear ; and parol evidence of the valuable consideration would be admissible in order to support the deed (a) ; and, secondly, because the prior grantee, if voluntary, may have made a conveyance for valuable consideration before the purchaser from the voluntary grantor (b). But yet it has been held, that a purchaser will be compelled to accept a title depending upon the invalidity of a voluntary deed (c). **2399.**

Copyholds  
are within  
the stat. 27  
Eliz. c. 4.

VII. Deeds  
void under  
stat. 27 Eliz.  
c. 4, s. 5, as  
subject to a  
power of  
revocation.

Copyholds are within the stat. 27 Eliz. c. 4 (d). **2400.**

VII. The stat. 27 Eliz. c. 4, s. 5 (made perpetual by stat. 30 Eliz. c. 18, s. 3), makes void, as against subsequent purchasers for money or other good consideration, all conveyances with any clause, provision, article, or condition of revocation, determination, or alteration at the grantor's will or pleasure, whether such clause, etc., extend to the whole interest conveyed, or only partially affect it (e). The words are these : "If any person or persons have heretofore since the beginning of the Queen's Majesty's reign that now is, made, or hereafter shall make any conveyance, gift, grant, demise, charge, imitation of use or uses, or assurance of, in, or out of any lands, tenements, or hereditaments, with any clause, provision, article, or condition of revocation, determination, or alteration, at his or their will or pleasure, of such conveyance, assurance, grants, limitations of uses or estates of, in, or out of the said lands, tenements, or hereditaments, or of, in, or out of any part or parcel of them, con-

(a) Sugd. Concise View, 570 ; 2 Pres. Shep. T. 511.

(b) Sugd. Concise View, 570 ; Burton, § 226—7.

(c) *Currie v. Nind*, 1 My. & Cr. 17 ;

*Butterfield v. Heath*, 15 Beav. 408.

(d) *Doe d. Tunstill v. Bottrick*, 5 B. & Ad. 131 ; *Currie v. Nind*, 1 My. & Cr. 25.

(e) Burton, § 224.

tained or mentioned in any writing, deed, or indenture of such assurance, conveyance, grant, or gift; and after such conveyance, grant, gift, demise, charge, limitation of uses, or assurance so made or had, shall or do bargain, sell, demise, grant, convey, or charge the same lands, tenements or hereditaments, or any part or parcel thereof, to any person or persons, bodies politic and corporate, for money or other good consideration paid or given (the said first conveyance, assurance, gift, grant, demise, charge or limitation, not by him or them revoked, made void or altered, according to the power and authority reserved or expressed unto him or them in and by the said secret conveyance, assurance, gift or grant) that then the said former conveyance, assurance, gift, demise, and grant, as touching the said lands, tenements, and hereditaments, so after bargained, sold, conveyed, demised or charged against the said bargainees, vendees, lessees, grantees, and every of them, their heirs, successors, executors, administrators, and assigns, and against all and every person and persons which have, shall, or may lawfully claim anything, by, from, or under them or any of them, shall be deemed, taken, and adjudged to be void, frustrate, and of none effect, by virtue and force of this present Act." 2401.

But by s. 6, it is provided, "that no lawful mortgage made or to be made *bonâ fide*, and without fraud or covin upon good consideration, shall be impeached or impaired by force of this Act, but shall stand in the like force and effect as the same should have done if this Act had never been had nor made; anything in this Act to the contrary in anywise notwithstanding." 2402.

In consequence of this statute, where a deed contains a power of revocation at the will of the grantor, or a power tantamount to it, and the deed is not revoked, it is void against subsequent purchasers, even though the deed be

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for a valuable consideration, unless the power of revocation can only be exercised with the consent of persons who are not under the control of the grantor (*a*). Powers to mortgage to an indefinite extent (*b*), and to lease all or part of the lands for any number of years, with or without rent (*c*), are in effect powers of revocation, and have therefore been held to render the deed in which they are contained void as against a subsequent purchaser (*d*). But a power to charge a sum of money on an estate is not in effect a power of revocation, unless the sum bears so large a proportion to the value of the estate, that the exercise thereof would virtually amount to a revocation (*e*). And a settlement with a power to the settlor to revoke, that the money might be paid to trustees to be invested in the purchase of other estates, would be valid (*f*). **2403.**

VIII. Mortgage or conveyance with notice of another's title.

VIII. Where a person takes a mortgage or a conveyance or a settlement with notice of the legal or equitable title of other persons to the same property, his own title will be postponed and made subservient to their title, or to that of a transferee from them (*g*), except in cases within the stat. 27 Eliz. c. 4 (*h*). Thus, if a person takes a mortgage of property, knowing that it was subject to an equitable mortgage made by deposit of the title-deeds, the notice of the equitable mortgage will raise a trust in him to the amount of the equitable mortgage (*i*). **2404.**

Doctrine of notice applies to property in a register county.

The effect of notice of a prior equitable mortgage above mentioned, is the case even where the property lies in a register county. The object of the Registry Acts

(*a*) 4 Cruise T. 32, c. 27, § 30, 35, 37; 2 Sugd. Pow. 223—4.

(*b*) 4 Cruise T. 32, c. 27, § 33.

(*c*) 4 Cruise T. 32, c. 27, § 34.

(*d*) 4 Cruise T. 32, c. 27, § 39—41.

(*e*) See 2 Sugd. Pow. 223.

(*f*) Sugd. Concise View, 571.

(*g*) Story's Eq. Jur. § 395—6;

Sugd. Concise View, 595, 597; *Atterbury v. Wallis*, 8 D. M. & G. 454;

*Pease v. Jackson*, L. R. 3 Ch. Ap.

576; *Barnes v. Wood*, L. R. 8 Eq.

424; *Marfield v. Burton*, L. R. 17 Eq. 15.

(*h*) See supra, par. 2401—2.

(*i*) Story's Eq. Jur. § 395.

was to afford to persons proposing to become mortgagees or purchasers, the means of discovering any prior incumbrances, if registered, or of protecting them against any unregistered and secret prior incumbrances or conveyances. Where, therefore, a person proposing to become a mortgagee or purchaser has actual notice of a prior unregistered incumbrance or conveyance, the principle of the Registry Acts becomes inapplicable; because it is his own folly if he is a loser by advancing any money by way of purchase or loan; and therefore, if a subsequent purchaser or mortgagee has notice at the time of his purchase or mortgage, of any prior unregistered conveyance or mortgage, he will not be permitted, in equity, to avail himself of his title against the prior conveyance or mortgage, any more than he would if the same were registered (a). **2405.**

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Notice may be either actual, or constructive, *i.e.*, imputed by construction of law (b). **2406.**

Actual notice, to constitute a binding notice, at least where it depends on oral communication only, must be given by a person interested in the property, and in the course of the treaty (c). **2407.**

Actual notice.

As to constructive notice, whatever is sufficient, or whatever for the purpose of justice is to be deemed sufficient, to put any person of ordinary prudence on inquiry, is constructive notice of everything to which that inquiry might have led (d). And hence a purchaser who has notice of a tenancy is deemed to have notice of a

Constructive notice.

(a) Story's Eq. Jur. § 397; 2 Spence's Eq. Jur. 763; Coote Mortg. 3rd ed. 381; 4 Cruise T. 32, c. 28, § 20; Sugd. Concise View, 578—9; 9 Jarm. & Byth. by Sweet, 691.

(b) 2 Spence's Eq. Jur. 754.

(c) 2 Spence's Eq. Jur. 753; Sugd. Concise View, 601.

(d) 2 Spence's Eq. Jur. 755—760;

Sugd. Concise View, 606; Coote Mortg. 3rd ed. 372; *Ogilvie v. Jeafreson*, 2 Gif. 353, 378; *Leigh v. Lloyd*, 2 D. J. & S. 330; *Broadbent v. Barlow*, 3 D. F. & J. 570; *Pilcher v. Rawlins*, L. R. 11 Eq. 53; reversed on appeal, 7 Ch. Ap. 259; *Marfield v. Burton*, L. R. 17 Eq. 15.

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lease, or of the terms of such tenancy, if any, and therefore cannot claim compensation on that account (a). And a purchaser or other person has constructive notice of the instrument under which he claims, or under which the person with whom he contracts, as executor, or trustee, or appointee derives his power. A man cannot claim under a deed or will, and yet repudiate a knowledge of its contents, though it may have been in fact concealed from him (b). And if a purchaser has notice of a deed, he has constructive notice of all its contents (c), and of the facts which would have necessarily become known, if its production had been insisted on (d). But if instead of referring the purchaser to a deed to ascertain its contents, the vendor himself states what the contents of the deed are, the purchaser is not bound to examine the deed itself, but may trust to such statement (e). It is sufficient if notice, actual or constructive, is brought home to the agent, solicitor, or counsel in the transaction, or in one immediately preceding it (f); unless there is a moral certainty that he would not have communicated, or unless he did not communicate, the fact to the principal or client (g), or he, colluding with the person who was bound to give the notice, concealed the fact (h). And where a mortgagor has at different times employed the same solicitor in effecting different incumbrances upon the same estate,

(a) *James v. Lichfield*, L. R. 9 Eq. 51; *Phillips v. Miller*, L. R. 9 C. P. 196; reversed in Ex. Ch., 10 C. P. 420.

(b) Story's Eq. Jur. § 400.

(c) Sugd. Concise View, 611, 671.

(d) Story's Eq. Jur. § 400; *Peto v. Hammond*, 30 Beav. 495; *Pilcher v. Rawlins*, L. R. 11 Eq. 53; reversed on appeal, 7 Ch. Ap. 259.

(e) *Cor v. Corenton*, 31 Beav. 378.

(f) Story's Eq. Jur. 408; 2 Spence's Eq. Jur. 760—1; Sugd.

Concise View, 602—3; *Atterbury v. Wallis*, 8 D. M. & G. 454; *Spaight v. Corne*, 1 Hem. & M. 359; *Rolland v. Hart*, L. R. 6 Ch. Ap. 678; *Maxfield v. Burton*, L. R. 17 Eq. 15; *Andrews v. City Permanent Benefit Building Society*, 44 L. T. (N.S.) 641.

(g) *Thompson v. Cartwright*, 33 Beav. 178, 185; *Saffron Walden Building Society v. Rayner*, L. R. 10 Ch. D. 696; 14 Ch. D. (Ap.) 406.

(h) *Sharp v. Foy*, L. R. 4 Ch. Ap. 35.

and the incumbrancers have employed the mortgagor's solicitor in the several transactions, each of the puisne incumbrancers has been held to be affected with notice of the prior incumbrances (a). But the circumstance of only one solicitor acting in a transaction does not necessarily constitute him the solicitor of both parties, so as to affect both parties with notice of the facts (b). **2408.**

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If a mortgagee, when he took his security from one partner, knew that the firm were in possession of the property, he had constructive notice of the title of the partnership; and his claim must be postponed to that of the other partner, as regards the other partner's share, and his right to be recouped in respect of partnership debts paid off by him, whether contracted before or after the mortgage (c). **2409.**

[The doctrine of constructive notice is somewhat restricted by stat. 45 & 46 Vict. c. 39, s. 3 (Appendix), which enacts: "(1) A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless (i.) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or (ii.) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent. (2) This section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision,

Stat. 45 & 4  
Vict. c. 39,  
s. 3. The  
Convey-  
ancing Act,  
1882.

(a) 2 Spence's Eq. Jur. 761; Eq. 4th ed. 70.

Fisher Mortg. 2nd ed. par. 1107.

(c) *Cavander v. Bultrel*, L. R. 9

(b) *Perry v. Holl*, 2 D. F. & J. 38; Ch. Ap. 79.

2 White and Tudor's Lead. Cas. in

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or restriction contained in any instrument under which his title is derived, mediately or immediately; and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted. (3) A purchaser shall not, by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted." ] **2409a.**

Though it is only prudent to do so, yet it is not the duty of a purchaser to search for incumbrances; for if it were, the registry would of itself be notice to all the world (*a*). But registration is not of itself notice (*b*). And hence a person having the legal estate as a mortgagee, and advancing more money without notice aliunde of a second mortgage, or of a purchaser of the equity of redemption, though duly registered, shall hold against the second mortgagee or purchaser of the equity of redemption, until all the money is paid (*c*). And, for the same reason, a purchaser obtaining the legal estate will not be prejudiced by a prior equitable incumbrance, of which, though duly registered previously to his purchase, he had no notice aliunde (*d*). And a purchaser of an equity of redemption for valuable consideration without notice of a prior registered judgment, will not be postponed to it, on proceedings by the judgment creditor (*e*). But if a man searches the register, he will be deemed to have notice; though, if a search is made for a particular period, the purchaser will not by the search be deemed to have notice of any instrument not registered within that period (*f*). **2410.**

(*a*) *Lane v. Jackson*, 20 Beav. 535, 538. Eq. Jur. 763; Sugd. Concise View, 136, 578; 4 Cruise T. 32, c. 28, § 16.

(*b*) Sugd. Concise View, 578; 9 Jarm. & Byth. by Sweet, 692; (*d*) Sugd. Concise View, 578; 9 Jarm. & Byth. by Sweet, 692.

*Lane v. Jackson*, 20 Beav. 535. (*e*) *Lane v. Jackson*, 20 Beav. 525.

(*c*) Coote Mortg. 3rd ed. 378; (*f*) Sugd. Concise View, 605.  
Story's Eq. Jur. § 401—2; 2 Spence's



The court rolls of a manor do not give constructive notice (a). **2411.**

PT.III. T.12,  
CH. 6, s. 3.

Notice before actual payment of all the money, although it be secured and the conveyance actually executed, or before the execution of the conveyance, notwithstanding that the money be paid, is equivalent to notice before the contract. But notice at the time of getting in a precedent incumbrance as a protection against mesne charges, is not material, provided there was no notice at the time of the purchase (b). **2412.**

Time of  
notice.

A purchaser of a leasehold estate, with notice of an equitable claim, will be protected, if he purchases from a prior bonâ fide purchaser without notice; for otherwise the latter would not enjoy the full benefit of his own unexceptionable title. And if a person who has notice sells to another who has no notice and is a bonâ fide purchaser for a valuable consideration, the title will not be affected with notice in the hands of the latter; for otherwise no man would be safe in any purchase (c). **2413.**

Protection  
of a pur-  
chaser  
against  
claims of  
which he  
has notice.

IX. If, on his marriage, a person demises, upon certain trusts for the benefit of his intended wife, lands of which he is tenant for life, and, by a *distinct* deed, covenants not to sell or incumber the lands comprised in the term, and it is declared, that, if he shall at any time sell or incumber them or attempt so to do, the trustees of the term shall recover the rents and profits, and apply them as they may think fit, for the maintenance and support of him or his wife or children or issue, the covenant and proviso are fraudulent and void as against a subsequent incumbrancer of his life estate (d). **2414.**

IX. Secret  
deed calcu-  
lated to de-  
fraud pur-  
chasers or  
incumbran-  
cers.

(a) Coote Mortg. 3rd ed. 382.

Sugd. V. & P. 14th ed. 153; 2 Lead.

(b) Sugd. Concise View, 599.

Cas. Eq. 2nd ed. 36, 37.

(c) See Story's Eq. Jur. § 409,  
41; 2 Spence's Eq. Jur. 764;

(d) *Phipps v. Lord Ennismore*,  
4 Russ. 131.

## SECTION IV.

*Of Contracts, Agreements, or Covenants which are against Public Policy.*

PR. III. T. 12.  
CH. 6, s. 4.

I. Where  
persons are  
not free  
agents ;  
but under  
duress, or in  
fear,

or under  
extreme  
necessity.

II. Assign-  
ments by  
persons  
holding  
office under  
Govern-  
ment, or  
under the  
late East  
India Com-  
pany,

These will not be enforced. **2414a.** And hence,

I. Where a party is not a free agent, and is not able to protect himself, a Court of Equity will protect him. Hence, equity will relieve against acts, done under duress, or under the influence of extreme terror or of threats. And it watches with great jealousy all contracts made by a person while under imprisonment ; and if there is the slightest ground to suspect oppression or imposition, it will set the contract aside. And in like manner, circumstances of extreme necessity and distress may so entirely overpower free agency, as to justify the Court in setting aside a contract on account of some oppression or fraudulent advantage attendant on it (a). **2415.**

II. An officer in the army or navy or other officer of the Government cannot assign his future accruing pay or other remuneration connected with the right to future services from him ; because it is contrary to the honour, dignity, and interest of the State, that its servants should be in danger of being reduced to poverty, by anticipating those resources which were intended to place them in a suitable condition of respectability, comfort, and efficiency (b). **2416.**

An assignment of the pension of an officer in the royal army is void. But an assignment of a pension granted by the late East India Company is valid (c). And so it has been held that a pension payable to a former officer of the East India Company out of the

(a) Story's Eq. Jur. § 239.

(b) See Story's Eq. Jur. § 769, 1040 c—1040 f, and notes ; Coote Mortg. 3rd ed. 101. 102 ; 2 Spence's

Eq. Jur. 867 ; 47 Geo. 3, sess. 2, c. 25, s. 4 ; *Lloyd v. Cheetham*. 3 Gif. 171.

(c) *Heald v. Hay*. 3 Gif. 467.

revenues of India since the Transfer Act (21 & 22 Vict. c. 106) may be assigned (a). And in cases which are not within any statutory prohibition, a man may assign a pension given him entirely for past services, unconnected with any right to future services; and prize money may be assigned (b). And an assignment of the income of a fellowship of a college is valid in equity (c). **2417.**

PT. III. T. 12,  
CH. 6, S. 4.

or by a  
fellow of a  
college.

An agreement that a person appointed to a public office shall pay to the person appointing him the surplus of his fees beyond a certain annual amount, is contrary to public policy, and void; because he is considered to require his fees to support him in performing the duties of his office. And this applies to a person appointed by a corporation, where he is not their officer, though the individual members may not appropriate any part to themselves (d). **2418.**

Agreement  
between ap-  
pointor and  
appointee  
of an office  
as to fees.

III. Equity will not uphold assignments which involve champerty, or maintenance, or buying of pretended titles (e). Champerty (*campi partitio*) is properly a bargain between a plaintiff or defendant in a cause, and another person who has no interest in the subject in dispute, to divide the land (*campum partire*) or other property sued for between them, if they prevail at law, in consideration of the other person carrying on the action at his own expense. Maintenance, of which champerty is a species, is an officious intermeddling in an action which in no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it. And an agreement whereby a person engages to supply

III. Assign-  
ments in-  
volving  
champerty,  
mainte-  
nance, or  
buying of  
pretended  
titles.

(a) *Carew v. Cooper*, 4 Gif. 619.

(b) 2 Spence's Eq. Jur. 867.

(c) *Feistel v. King's College*, 10 Beav. 491.

(d) *Corp. of Liverpool v. Wright*, 1 Johns. 359.

(e) Story's Eq. Jur. § 1049; *Reynell v. Spry*, 1 D. M. & G. 660; *Grell v. Lery*, 16 C. B. (N. S. 73).

Pr. III. T. 12,  
Ch. 6, s. 4

information and evidence for the recovery of property, on condition of receiving a part of it, is maintenance of the worst kind, as it leads to perjury and perversion of justice (*a*). Champerty and maintenance are punishable, both at the common law and by statute, as tending to keep alive strife and contention, and to pervert the remedial process of the law into an engine of oppression. Exceptions are made, however, to the general rule against champerty and maintenance, in the case of father and son, or of an heir apparent, or of the husband of an heiress, or of a master and servant and the like (*b*). And a deed, whereby, in consideration of a son prosecuting a commission of lunacy in the father's name against a person to whom the father is heir at law, the father covenants to convey the estates that should descend to him on the lunatic's decease, to the use of himself for life, with remainder to the use of the son and his children, is not illegal, as savouring of champerty or maintenance, or as against public policy (*c*). **2419.**

IV. Assignments of mere naked rights to litigate.

IV. Upon the same principle of not giving any encouragement to litigation, especially when undertaken as a speculation, equity will not enforce the assignment of a mere naked right to litigate, that is, a right which, from its very nature, is incapable of conferring any benefit except through the medium of a suit; such as a mere naked right to set aside a conveyance for fraud (*d*). But a person who is interested in a fund in Court, may mortgage it pendente lite, to enable him to prosecute his claim (*e*). And a person may take an assignment of the whole interest of another in a

(*a*) *Sprye v. Porter*, 7 El. & Bl. 58, 81; *Hilton v. Woods*, L. R. 4 Eq. 432.

(*b*) Story's Eq. Jur. § 1049; 2 Spence's Eq. Jur. 870—1.

(*c*) *Persse v. Persse*, 7 Cl. & F. 279.

(*d*) Story's Eq. Jur. § 1040g, and note; 2 Spence's Eq. Jur. 868—9, 872.

(*e*) *Cockell v. Taylor*, 15 Beav. 103, 116, 117. See *Hill v. Boyle*, L. R. 4 Eq. 260.

contract, or security, or property which is in litigation, at least if he does not undertake to pay the costs which the seller had incurred, or make any advances beyond the mere support of the interest which he has so acquired. Thus, notwithstanding the stat. 32 Hen. 8, c. 9, referred to below, an equitable interest under a disputed contract for the purchase of real estate may be the subject of sale. If such an interest is sold by the purchaser under such original contract, he becomes in equity a trustee for his sub-purchaser, and must permit the sub-purchaser to use his name in proceedings for obtaining the benefit of the contract. And without entering into any covenants for the purpose, such sub-purchaser is obliged to indemnify the original purchaser from all the acts which he must do for the sub-purchaser's benefit. And so, a legatee may assign his legacy, and a creditor may assign his interest in a debt, although he may have taken proceedings to recover it (a). In these cases there is an actual interest in the assignor, independently of litigation; and although it may require continued litigation to enforce it, yet the parties may possibly adjust the matter without further proceedings; whereas, in the case first mentioned, there is no interest in the assignor, or none but what may result from oversetting an interest in the other party (b). But no solicitor can be permitted to purchase anything in litigation, of which he has the management (c). If, however, a person who has recovered property conveys it to his solicitor by way of security for costs incurred before the date of the conveyance, that is not unlawful (d). **2420.**

(a) Story's Eq. Jur. § 1050—1054; 2 Spence's Eq. Jur. 863, 868—871; Sugd. Concise View, 259; *Harrington v. Long*, 2 My. & K. 590; *Myers v. United Guarantee Comp.* 7 D.M. & G. 112; *Tyson v. Jackson*, 30 Beav. 384.

(b) See *Prosser v. Edmonds*, 1 Y. & C. Eq. Exch. 481.

(c) *Simpson v. Lamb*, 7 El. & Bl. 84, 93.

(d) *Anderson v. Radcliffe*, 1 El. Bl. & El. 806, 819.

PT. III. T. 12,  
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V. Assign-  
ments of  
things in  
action,  
rights of  
entry, possi-  
bilities, and  
executory  
interests.

V. Things in action, rights of entry, and contingent remainders and other executory interests in favour of persons ascertained, might always be released by deed to any one having a sufficient estate or interest by right or by wrong (*a*). But the stat. 32 Hen. 8, c. 9, prohibits the sale of any right or title to hereditaments, unless the seller or his ancestor, or those by whom he claims, have been in possession of the same, or of the remainder or reversion thereof, or of the rents and profits thereof, for one year next before the sale (*b*); or unless the purchaser is in lawful possession, in which case he may buy in any pretended right, and he will not in any case be affected, unless he bought with notice (*c*). Indeed, it is a rule of the common law, that no possibility, right, title, or thing in action, entry, or re-entry, can be granted to third persons, except in the case of the Crown, to whom and by whom an assignment could always be made; for it was thought that a different rule would be the means of multiplying contests and suits. So that a stranger could not take advantage of the breach of a condition for the avoidance of an estate of freehold, as that is only avoidable by entry; or even of an estate for years, where it was only voidable by entry. But a stranger might take advantage of a condition, the breach of which rendered an estate for years ipso facto void without entry; for a stranger might take the benefit of a void thing, but not of a voidable estate, by entry (*d*). Nor could contingent remainders or other executory interests in real or personal estate be granted over. And, at law, this still continues to be the rule, except in the case of negotiable instru-

(*a*) 2 Bl. Com. 290; 2 Pres. Shep. T. 231, 238, 322; 4 Jarm. & Byth. by Sweet, 122, 123; Watk. Conv. 3rd ed. by Prest. 114; supra, par. 2010, 2012.

(*b*) Story's Eq. Jur. § 1048 and

note, and 1048 a; 2 Spence's Eq. Jur. 869.

(*c*) Sugd. Concise View, 258.

(*d*) Co. Litt. 214 a, b, 215 a, 218 a.

ments, and some few other securities ; and except in the case of an assignment of a debt, where the debtor assents to the transfer, so as to enable the assignee to maintain a direct action against him on the implied promise which results from such assent (*a*) ; and except in cases within the stat. 8 & 9 Vict. c. 106, s. 6. **2421.**

By the stat. 7 & 8 Vict. c. 76, s. 5, it was enacted as follows: — “ That any person may convey, assign, or charge, by any deed any such contingent or executory interest, right of entry for condition broken, or other future estate or interest as he shall be entitled to, or presumptively entitled to, in any freehold or copyhold or leasehold land, or personal property, or any part of such interest, right, or estate respectively ; and every person to whom any such interest, right, or estate shall be conveyed or assigned, his heirs, executors, administrators, or assigns, according to the nature of the interest, right, or estate, shall be entitled to stand in the place of the person by whom the same shall be conveyed or assigned, his heirs, executors, administrators, or assigns, and to have the same interest, right, or estate, or such part thereof, as shall be conveyed or assigned to him, and the same actions, suits, and remedies for the same, as the person originally entitled thereto, his heirs, executors, or administrators would have been entitled to if no conveyance, assignment, or other disposition thereof had been made ; provided that no person shall be empowered by this Act to dispose of any expectancy which he may have as heir, or heir of the body inheritable, or as next of kin, under the statutes for the distribution of the estates of intestates, of a living person, nor any estate,

Pt. III. T. 12,  
Ch. 6, s. 4.

Stat. 7 & 8  
Vict. c. 76,  
s. 5.

(*a*) Story's Eq. Jur. 1039 ; 2 Sweet, 122 ; Fearne 366 ; Burton, Spence's Eq. Jur. 850, 851, 855 ; 2 § 857, 946—7 ; Watk. Conv. 3rd ed. Bl. Com. 290, 442 ; 2 Pres. Shep. T. by Prest. 97, 114, 116 ; Co. Litt. 231, 238—240, 322 ; 4 Cruise T. 214 a, b, 215 a, 232 b, 266 a. 32, c. 7, § 21 ; 4 Jarm. & Byth. by

PR. III. T. 12,  
CH. 6, S. 4.

right, or interest to which he may become entitled under any deed thereafter to be executed, or under the will of any living person, and no deed shall by force of this Act bar or enlarge any estate tail: provided also, that no chose in action shall by this Act be made assignable at law." **2422.**

Stat. 8 & 9  
Vict. c. 106,  
s. 6.

This was repealed by the stat. 8 & 9 Vict. c. 106; but by s. 6 of that Act it was enacted, that "after the 1st day of October, 1845, a contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England, of any tenure, may be disposed of by deed; but that no such disposition shall, by force only of this Act, defeat or enlarge an estate tail; and that every such disposition by a married woman shall be made conformably to the provisions relative to dispositions by married women," contained in the English (a) and Irish Acts for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance. **2423.**

It has been held that this section does not relate to a right of entry for a condition broken (b). **2424.**

Executory  
interests  
bound by  
estoppel.

Even in cases not within the stat. 7 & 8 Vict. c. 76, s. 5, and 8 & 9 Vict. c. 106, s. 6, contingent remainders and other executory interests in real or personal estate might be bound by estoppel, on a fine or recovery, or, it seems, even on an indenture (c). They are also assignable in equity for valuable consideration. And it would

Executory  
interests,  
possibili-

(a) Stat. 3 & 4 Will. 4, c. 76, see supra, par. 2227—2232 a.

(b) Shelf. Real Prop. Acts, 6th ed. 597.

(c) 2 Pres. Shep. T. 238, 322; 4

Jarm. & Byth. by Sweet, 122—128; Watk. Conv. 3rd ed. by Prest. 97, 116; Smith's Executory Interests annexed to Fearn, § 754—756.



seem that they are assignable in equity even for good consideration, except as against *bonâ fide* purchasers. A voluntary assignment of a mere expectancy is invalid both at law and in equity. But Courts of Equity give effect to assignments, for valuable consideration, of possibilities and even of mere expectancies of heirs at law, and choses in action. Such assignments of a chose in action were considered in equity as amounting to an agreement to permit the assignee to make use of the name of the assignor at law, in order to recover the debt, and enforce payment of the debt directly against the debtor, whether he has assented or not, making him, as well as the assignor, if necessary, a party to the suit (*a*). And such assignments of possibilities and expectancies are regarded in equity as amounting to a contract to assign when the interest becomes vested; and when the interest does so become vested, the claim of the assignee is enforced, not indeed as a trust, but as a right under a contract (*b*). **2425.**

Pr. III.T.12,  
CH. 6, s. 4.

ties, or ex-  
pectancies,  
and choses  
in action  
assignable  
in equity.

VI. At law, an assignment of goods which do not belong to the assignor at the time does not pass the property in them. And accordingly at law, a bill of sale of the effects in a given place will only pass such things as are in that place at the time of the grant, though effects to be subsequently brought on the premises are expressly included. But if a person sells or mortgages after-acquired chattels, the contract may operate as an actual assignment in equity, having the effect of transferring the property immediately it is acquired by the vendor or mortgagor, if it purports to confer an

VI. Assign-  
ment of  
things not  
belonging to  
the assignor  
at the time.

(*a*) See Story's Eq. Jur. § 1040, 1040 c, 1044, 1055, 1057; 2 Spence's Eq. Jur. 852, 865, 866, 896; 2 Pres. Shep. T. 231, 238, 240, 322; 2 Bl. Com. 442; Coote Mortg. 3rd ed. 235; 4 Jarm. & Byth. by Sweet, 122; Co. Litt. 232 b, n. (1); Watk.

Conv. 3rd ed. by Prest. 87, 116; Smith's Executory Interests annexed to Fearne, § 749, 750; and stat. 36 & 37 Vict. c. 66, s. 25 (6), *supra*, par. 2077a.

(*b*) Story's Eq. Jur. § 1040 b.

Pr. III. T. 12,  
Ch. 6, s. 4.

interest immediately by its own force, as distinguished from a mere power of entry. And the instrument may be so framed as to give the mortgagee, even at law, a power of seizing such future chattels of the grantor as they should be acquired and brought upon the premises (a). And the future fruits or proceeds of property which the grantor has at the time of the assignment will pass. Thus, the next year's wool of sheep belonging to the grantor is capable of being assigned (b). And so a tenant's interest in crops grown in future years will pass by an assignment to the landlord of all the tenant's "tenant-right and interest yet to come and unexpired in and to the farm" (c). An assignment of freight not actually earned, but to be earned, is good in equity (d). And the right to freight is incidental to the ownership of the vessel which earns it; and therefore a mortgage of a ship carries with it the freight, and a transfer of a share in a ship passes the corresponding share in the freight, under an existing charter party, without the mention of the word "freight" (e). An assignment for valuable consideration of a cargo to be obtained is valid in equity (f). And a debtor may assign future accruing payments to be made to him under an engagement with a third person (g). And if a policy of assurance is assigned, with the sum assured, future bonuses will pass with it (h). **2426.**

VII. Mar-  
riage

VII. Marriage brokerage contracts, which are agreements

(a) *Lunn v. Thornton*, 1 M. Gr. & Sc. 379; *Gale v. Burnell*, 7 Ad. & E. (N. S.) 850; Coote Mortg. 3rd ed. 235; *Hope v. Hailey*, 5 Ell. & Bl. 830; *Holroyd v. Marshall*, 2 Gif. 382; 2 D. F. & J. 596; 10 H. L. Cas. 191; *Belding v. Read*, 3 Hurl. & Colt. 955; *Reeve v. Whitmore*, 33 L. J. (N. S.) 63.

(b) Coote Mortg. 3rd ed. 235.

(c) *Petch v. Tutin*, 15 M. & W. 110.

(d) *Douglas v. Russell*, 4 Sim. 524; affirmed 1 My. & K. 488; *Lindsay v. Gibbs*, 22 Beav. 522; *Brown v. Tanner*, L. R. 2 Eq. 806; 3 Ch. Ap. 597.

(e) *Lindsay v. Gibbs*, 22 Beav. 522; *Rusden v. Pope*, L. R. 3 Ex. 269.

(f) *Langton v. Horton*, 1 Hare 549.

(g) Coote Mortg. 3rd ed. 236.

(h) Coote Mortg. 3rd ed. 235.

whereby a party engages to give another a remuneration if he will negotiate a marriage for him, are void, as tending to introduce matches which are ill-advised and not based on mutual affection, and therefore against public policy. And they are so utterly void, that they are deemed incapable of confirmation; and money paid under them may be recovered back again in a Court of Equity, whether the marriage is an equal or an unequal one (*a*). **2427.**

Pr. III. T. 12,  
Ch. 6, s. 4.

brokage  
contracts.

VIII. The same rules are applied to bonds and other agreements entered into as a reward for using influence over another, to induce him to make a will for the benefit of the obligor (*b*); for such contracts encourage a spirit of artifice and scheming, most prejudicial to the moral tone of those in whom it exists; and they tend to deceive and injure others. **2428.**

VIII. Agree-  
ments to in-  
fluence tes-  
tators.

IX. On a similar ground, secret contracts made with parents, or guardians, or other persons standing in a peculiar relation to another, whereby on a treaty of marriage, they are to receive a remuneration, for promoting the marriage or giving their consent to it, are held void (*c*). **2429.**

IX. Con-  
tracts to  
facilitate  
marriages.

X. On the other hand, a contract is void, if it is expressly in restraint of marriage generally, or if it is so restricted that it is probable that it may virtually operate in restraint of marriage generally (*d*); as, that a woman shall not marry a man who has not an estate of 500*l.* a year (*e*), or shall not marry till fifty years of age, or shall not marry any person residing in the same town, or any person who is a clergyman, a physician, or a lawyer, or any person except of a particular trade or occupation (*f*). **2430.**

X. Contracts  
in restraint  
of marriage.

(*a*) Story's Eq. Jur. § 260—263.

(*b*) Story's Eq. Jur. § 265.

(*c*) Story's Eq. Jur. § 266,  
267.

(*d*) See Story's Eq. Jur. § 274,  
276—283.

(*e*) Story's Eq. Jur. § 280.

(*f*) Story's Eq. Jur. § 283.

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CH. 6, S. 4.

XI. So, contracts in general restraint of trade are void, as tending to discourage industry, enterprise, and just competition. But a person may be restrained from carrying on trade in or within a certain distance from a particular place, or with particular persons, or for a reasonable limited time (*a*). **2431.**

XI. Con-  
tracts in  
restraint of  
trade.

Some contracts for the partial restraint of trade are upheld, because they are advantageous not only to the individual in favour of whom the restraint is inserted, but to the public also, who, instead of being thereby injured, derive advantage in the unrestrained choice of able assistants which such a stipulation gives to the employer, and in the security it affords that the master will not withhold from his assistants instruction in the secrets of his trade and the communication of his own skill and experience, from any fear of afterwards having a rival in the same business. And hence a stipulation on the part of an assistant to a London dentist not to practise in London, will be enforced. But whatever restraint is larger than the necessary protection of the person with whom the contract is made, is unreasonable and void, as being injurious to the interest of the public, on the ground of public policy. And therefore a contract by an assistant to a London dentist not to practise in any of the places in England or Scotland where the employer might have been practising before the expiration of the service, is void (*b*). But a covenant, on the sale of the business of a horse-hair manufacturer at a given place, not to carry on the same business within 200 miles of that place, is good (*c*). **2432.**

XII. Sup-  
pression of  
criminal  
proceed-  
ings.

XII. Agreements for the suppression of criminal prosecutions are void (*d*), as tending to weaken the

(*a*) Story's Eq. Jur. § 292 ; *Benwell v. Inns*, 24 Beav. 307 ; *Harms v. Parsons*, 32 Beav. 328 ; *Catt v. Tourle*, L. R. 4 Ch. Ap. 654.

(*b*) *Mallan v. May*, 11 M. & W. 653. See *supra*, par. 1798.

(*c*) *Harms v. Parsons*, 32 Beav. 328.

(*d*) Story's Eq. Jur. § 294.

beneficial preventive influence of the law, by diminishing the certainty of punishment. And an agreement by a petitioner in a suit for divorce, to withdraw from the suit, in consideration of money to be paid to the petitioner, is void as a fraud on the Divorce Act, which enables the Court to apply damages for the benefit of the wife or of the children (a). **2433.**

PT. III. T. 12,  
CH. 6, s. 4.

XIII. Simoniactal contracts are void, as contrary to public policy. Simony is the corrupt presentation of any one to an ecclesiastical benefice, for money, gift, or reward (b). By the stat. 31 Eliz. c. 6, s. 5, it is enacted, "that if any person or persons, bodies politic and corporate, shall or do at any time after the end of forty days next after the end of this session of Parliament, for any sum of money, reward, gift, profit or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurances, of or for any sum of money, reward, gift, profit or benefit whatsoever, directly or indirectly, present or collate any person to any benefice with cure of souls, dignity, prebend or living ecclesiastical, or give or bestow the same, for or in respect of any such corrupt cause or consideration; that then every such presentation, collation, gift and bestowing, every admission, institution, investiture and induction thereupon, shall be utterly void, frustrate, and of none effect in law; and that it shall and may be lawful to and for the Queen's Majesty, her heirs and successors, to present, collate unto, or give or bestow every such benefice, dignity, prebend and living ecclesiastical for that one time or turn only; and that all and every person or persons, bodies politic and corporate, that from thenceforth shall give or take any such sum of money, reward, gift, or benefit, directly or indirectly, or that shall take or make

XIII. Simo-  
niactal con-  
tracts.

(a) *Gipps v. Hume*, 2 Johns. & Hem. 517

(b) 2 Bl. Com. 278.

Pr. III. T. 12,  
Ch. 6, s. 4.

any such promise, grant, bond, covenant or other assurance, shall forfeit and lose the double value of one year's profit of every such benefice, dignity, prebend and living ecclesiastical; and the person so corruptly taking, procuring, seeking, or accepting any such benefice, dignity, prebend or living, shall thereupon and from thenceforth be adjudged a disabled person in law to have or enjoy the same benefice, dignity, prebend or living ecclesiastical." And by the stat. 12 Anne st. 2, c. 12, s. 2, it is enacted, that "if any person shall or do, for any sum of money, reward, gift, profit, or advantage, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance, of or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly, in his own name, or in the name of any other person or persons, take, procure, or accept the next avoidance of or presentation to any benefice with cure of souls, dignity, prebend or living ecclesiastical, and shall be presented or collated thereupon, that then every such presentation or collation, and every admission, institution, investiture, and induction upon the same shall be utterly void, frustrate, and of no effect in law, and such agreement shall be deemed and taken to be a simoniacal contract; and that it shall and may be lawful to and for the Queen's Majesty, her heirs and successors, to present or collate unto, or give or bestow every such benefice, dignity, prebend, and living ecclesiastical, for that one time or turn only; and the person so corruptly taking, procuring, or accepting any such benefice, dignity, prebend or living, shall thereupon, and from thenceforth, be adjudged a disabled person in law to have and enjoy the same" (a). **2434.**

Although he who is presented be not aware of the simony, yet the presentation, admission, and induction

(a) See 2 Bl. Com. 279.

are void. But if the presentee be not cognisant of the corruption, then he shall not be within the clause of disability in the statute (*a*). **2435.**

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CH. 6, S. 4.

As to what constitutes simony, the following rules may be laid down: 1. A purchase of a next presentation made after the church has actually fallen vacant, is void; and a purchase of an advowson at such a time is void, quoad the fallen vacancy, but not otherwise (*b*). 2. For a clerk to bargain for the next presentation, the incumbent being sick and about to die, was simony, even before the statute of Queen Anne: and now, by that statute, to purchase either in his own name or in another's the next presentation, and be thereupon presented at any future time to the living, is simony (*c*). But, 3, where a person purchases the next presentation to a benefice, the church being then full, and the incumbent not ill, even though the purchaser intends to present a particular person other than himself, and he afterwards does present that person, such a purchase is not deemed simony (*d*). 4. A purchase of the next presentation to a church, even when the incumbent is in a dying state, is not simony, if without the privity and without any view to the nomination of the particular person presented (*e*). And a purchase made of an advowson in fee simple under similar circumstances, is not simony (*f*). **2436.**

The stat. 9 Geo. 4, c. 94, s. 1, declares valid every engagement by promise, grant, agreement, or covenant for the resignation of benefices which are private property, after the 28th of July, 1828, to the expressed intent of appointing any one person therein named, or one of two

Engage-  
ments to  
resign bene-  
fices.

(*a*) 3 Cruise T. 21, c. 2, § 59; 2 Bl. Com. 280.

Steph. Com. 72.

(*b*) 3 Cruise T. 21, c. 2, § 64; 3 Steph. Com. 70, 71, 72; 2 Pres. Shep. T. 240.

(*e*) 3 Steph. Com. 72; Sugd. Concise View, 259.

(*c*) 2 Bl. Com. 479.

(*f*) 3 Cruise T. 21, c. 2, § 68; Sugd. Concise View, 259; 3 Steph. Com. 71.

(*d*) 3 Cruise T. 21, c. 2, § 67; 3

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persons therein named, each of whom is related by blood, or marriage, as uncle, son, grandson, brother, nephew, or grand-nephew of the person, or the wife of the person, in whom the patronage is beneficially vested. But such engagement must be entered into before the appointment of the person entering into it, and one part of the instrument must be deposited within two months with the registrar of the diocese or peculiar jurisdiction. **2437.**

XIV. Agree-  
ment to  
convey pro-  
perty, if  
devised.

XIV. There is nothing contrary to the policy of the law as tending to murder, or to undue influence over a testator, or contrary to the stat. 32 Hen. 8, c. 9, relating to pretended titles, in an agreement by a person who expects to become devisee of land, that, if he should be such, he will convey it to another person for a certain sum; but if he should not become devisee, he will return the money (*a*). **2438.**

XV. Usu-  
rious con-  
tracts.

XV. In consequence of the stat. 12 Anne st. 2, c. 16, a contract for the payment of more than 5*l.* per cent. interest was usurious, except in certain cases (*b*). But by the stat. 17 & 18 Vict. c. 90, the statutes relating to usury, except those relating to pawnbrokers, are repealed, as regards transactions subsequent to the 10th of August, 1854, the time of the passing of the Act. **2439.**

A transaction is sometimes void as indirectly operating in violation of the law against usury (*c*). Thus, a purchase of a rent-charge or an annuity for a determinate number of years was set aside as usurious in equity, if the total amount of the annual payments was more than sufficient to pay the principal sum and legal interest (*d*). So, a lease to be granted in consideration of a loan of money, could not be supported. But where the creditor

(*a*) *Cook v. Feild*, 15 Ad. & E. 460. Drew. 157.

(*b*) See 2 Steph. Com. 86—94; Stamp's Index to the Statute Law. tit. "Usury"; *Bond v. Bell*, 4

(*c*) *Earl of Mansfield v. Ogle*. 7 D. M. & G. 181.

(*d*) Coote Mortg. 3rd ed. 423.



was to be repaid his principal and legal interest by way of a rent to be received or retained by him, the agreement was in the nature of a mortgage security, and was supported in equity. Where an instrument which was in appearance a lease, was in fact a contrivance to secure to the vendor the purchase-money by instalments carrying illegal interest, it was usurious and void. And where a builder assigned his lease or contract for a lease in consideration of a sum of money advanced to him, and, as part of the same transaction, took or agreed to take an underlease at a rent greatly exceeding the rate of interest on the sums advanced, after deducting the ground rent (so that the total amount of the payments during the lease would exceed the principal moneys and interest), and with the same covenants and obligations in the underlease as were contained in the original lease, the Courts both of Equity and Common Law have treated such contracts as usurious, notwithstanding the liability of the lender to the superior landlord, and risk of forfeiture, and although he might have no power of calling in his money, whilst the other might have an unlimited power of repurchasing (a). [On a similar ground, relief is afforded in some cases against penalties (b).] **2440.**

PT.III. T.12,  
CH. 6, s. 4.

XVI. Where contracts are intended to carry into effect an immoral purpose (as in the case of a house let for a brothel), even though that purpose do not appear on the face of the instrument, the Courts will not enforce any of the stipulations therein comprised (c). **2441.**

XVI. Contracts to effectuate an immoral purpose.

## SECTION V.

### *Of Deeds void for Uncertainty.*

An agreement will not be enforced, if the terms of it are uncertain (d). **2442.**

PT.III. T.13,  
CH. 6, s. 5.

(a) Coote Mortg. 3rd ed. 424.

(c) *Smith v. White*, L. R. 1 Eq. 626.

(b) See Smith's Manual of Equity, 13th ed. 670.

(d) *Taylor v. Portington*, 7 D. M. & G. 328.

PT. III. T. 12,  
CH. 6, s. 5.

A deed is void for uncertainty, if it is totally uncertain on the face of it who is or are the intended grantee or grantees. Thus, if a grant is made to one of the children of J. S., who has more than one child, and the grantor does not describe which he intends, this grant is void for uncertainty, and cannot be rendered good by any evidence; for the ambiguity is patent, and parol evidence is inadmissible (a). **2443.**

An instrument which is left blank in any material part, is incapable of operation until such blank is filled up, although executed by the parties, and does not become effectual by the subsequent filling up of the blank by a stranger, in the absence of the parties, unless he is authorised to do so by deed (b). **2444.**

## SECTION VI.

### *Of the Avoidance of a Deed by Disagreement (c).*

PT. III. T. 12,  
CH. 6, s. 6.

No person can be made to take an estate without his consent, express or implied; and therefore the purchases of idiots, lunatics, infants, and femmes covert, if disadvantageous, may be set aside (d). And it is common for trustees, when nominated without their consent, to renounce the estate conveyed to them, which is done by deed of disclaimer (e). **2445.**

The law presumes that every conveyance is for the benefit of the grantee; and, therefore, till the contrary is shown, supposes an agreement to the conveyance. But from the moment there is evidence of disagreement, the conveyance, in construction of law, is void ab initio, as if none had been made; and in intendment of law, the freehold never passed from the grantor (f). **2446.**

(a) 2 Pres. Shep. T. 251.

(b) 3 Jarm. & Byth. by Sweet, 19.

(c) See supra, par. 2082—4.

(d) Burton, § 212.

(e) Burton, § 213.

(f) 2 Pres. Shep. T. 285; Watk. Conv. 3rd ed. by Prest. 23; *Peacock v. Eastland*, L. R. 10 Eq. 17.

If, however, a feoffment is made to two as joint tenants, and only one disagrees, the entirety vests in the other. But if a feoffment is made to two tenants in common, and one disagrees, this only avoids the grant as to his share (a). **2447.**

PT. III. T. 12,  
CH. 6, s. 6.

When the party, being free from insanity, coverture, or infancy, has once by his agreement made the deed good, he cannot afterwards by his disagreement make it void. And when once by refusal and disagreement he has made the deed void, he cannot by agreement or acceptance afterwards make it good (b). **2448.**

(a) 2 Pres. Shep. T. 285 ; see  
supra, par. 2084.

(b) 1 Pres. Shep. T. 70.

## CHAPTER VII.

### OF DIVERS MATTERS PERTAINING TO DEEDS IN GENERAL.

#### SECTION I.

##### *Of Stamping Deeds (a).*

PT.III. T.12,  
CH. 7, s. 1.

IT is generally necessary that a deed should be stamped, as required by the Stamp Acts, in order to render it available in Court for the purposes for which it was made. But the want of a proper stamp does not prevent its legal effect and operation in other respects (*b*), or its reception in evidence for a collateral purpose. **2449.**

The deed ought regularly to be, and usually is, properly stamped before execution. But the stamp may be affixed afterwards, on payment, in addition to the duty, of a certain penalty. **2450.**

#### SECTION II.

##### *Of the Execution of Deeds.*

PT.III. T.12,  
CH. 7, s. 2.

I. Reading.

I. So far as regards any person requiring a deed to be read, it is necessary to its validity, either that he be permitted to read it himself, or, if he cannot read, that

(*a*) See Sweet's Supplement to Jarm. & Byth. Conveyancing, which contains a summary of the Stamp Laws; and see Vacher's two Pocket Digests of the Stamp Duties; Chitty

on Contracts, and Addison on Contracts.

(*b*) 4 Cruise T. 32, c. 2, § 57; Burton, § 451; Smith's Manual of Common Law, 9th ed. 261.

it be read to him. If it be read to him falsely, it will PT. III. T. 12,  
CH. 7, s. 2. be void, at least for so much as was misread; unless it be agreed by collusion that the deed should be read falsely, on purpose to make it void; in which case it will bind the fraudulent party (a). **2451.**

II. Signing is often necessary to the valid execution of powers. And in cases within the Statute of Frauds, the better opinion would seem to be, that it is rendered necessary by that statute (b). In practice it is an invariable part of the execution of all deeds, as the present practice of sealing cannot serve any purpose of identification or verification, but has degenerated into a mere form. But where a person is incapacitated from signing, by infirmity or want of instruction, he may either make a mark by way of signature to a deed, or it may be signed for him by a stranger at his request and in his presence (c). **2452.**

III. A seal is essential to a deed, since no writing without a seal can be a deed. But if the deed is sealed with any seal whatever, or even if an impression is made or attempted to be made with a stick or anything else, it is sufficient (d). It is sufficient that there is a seal to the deed at the time of its actual or constructive delivery; and that the party, in terms or by conduct, adopts the sealing. And if another person seals the deed, yet if the party delivers it himself, he thereby adopts the sealing (e). **2453.**

The common practice is for the copying clerk to affix any kind of seal when he has finished copying the deed, and

(a) 2 Bl. Com. 304; 4 Cruise T. 32, c. 2, § 61; 3 Jarm. & Byth. by Sweet, 24; 1 Pres. Shep. T. 56.

(b) 2 Bl. Com. 305, 306; 4 Cruise T. 32, c. 2, § 66, 69; Mr. Hilliard's note to 1 Pres. Shep. T. 56. But see Mr. Preston's remarks, *Ib.*, and 1 Sugd. Pow. 286, contra.

(c) 3 Jarm. & Byth. by Sweet, 24, 25.

(d) 2 Bl. Com. 305; 4 Cruise T. 32, c. 2, § 63; 1 Pres. Shep. T. 54, 56, 57; *In re Sandilands*, L. R. 6 C. P. 411.

(e) 2 Bl. Com. 306; 1 Pres. Shep. T. 54.

Common practice.

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Ch. 7, s. 2.

for the party to adopt the sealing at the time of execution, by placing his finger on the seal, and saying, "I deliver this as my act and deed." **2454.**

Sealing by  
one of the  
grantors,  
obligors,  
etc., only.

If there are several grantors, obligors, etc., named in a deed, and one of them only seals the deed, this is a good deed as against him, and void as to all the rest (a). **2455.**

Sealing and  
signing by  
attorney.

A person may appoint another to be his attorney to seal and sign a deed for him. [In such a case the deed must formerly have been executed in the name of the principal. This rule is now altered by the provisions of stat. 44 & 45 Vict. c. 41, s. 46 (Appendix), which enables the attorney to execute it in his own name, but the attorney still may execute the deed in the name of his principal as before the Act, which would seem to be the better course to adopt in many cases (b).] **2456.**

IV. Deli-  
very.

Delivery  
actual, or  
verbal, or  
both.

IV. Delivery is another circumstance necessary to a deed (c). Delivery may be actual, *i.e.*, by doing something; or verbal, *i.e.*, by saying something; or both actual and verbal, *i.e.*, by both doing and saying something (d). **2457.**

Delivery by  
the party, or  
by another.

And a deed may either be delivered by the party himself who makes it, or by any other person, by his appointment, or authority precedent, or assent or agreement subsequent (e). Where one person delivers an instrument as the act of another person who is present, no deed conferring an authority is requisite. But unless authorised by deed, a person cannot execute an instrument as the act of a person who is absent; and every letter of attorney must be by deed (f). **2458.**

Delivery to

A deed may be delivered to the party himself; or

(a) 1 Pres. Shep. T. 71.

(b) 4 Cruise T. 32, c. 2, § 67 ;  
but see *supra*, par. 1740.

(c) 4 Cruise T. 32, c. 2, § 68 ; 2  
Bl. Com. 306.

(d) Co. Litt. 36 a ; 1 Pres. Shep.  
T. 57 ; 4 Cruise T. 32, c. 2, § 71.

(e) 1 Pres. Shep. T. 57.

(f) 1 Pres. Shep. T. 57.

it may be delivered to any other person by sufficient authority from him, or to any stranger, for and on behalf and to the use of him to whom it is made, without authority (a); or it may be delivered verbally and constructively, by saying, "I deliver this as my act and deed," or words to the like effect, and yet be retained in the custody of the party who made it (b).

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Ch. 7, s. 2.

the party,  
to another,  
or construc-  
tively.

### 2459.

A deed may be either delivered absolutely as a deed, or it may be delivered conditionally as an escrow, *i.e.*, as a scroll or writing (c). Regularly, when a deed is delivered as an escrow, it ought to be delivered to a third person and in terms as an escrow, in such words as these: "I deliver this to you as an escrow, to deliver to the party as my deed, upon condition, etc., or at such a time." And this mode of delivery should be noticed in the attestation (d). But in opposition to some of the early authorities (e), it is now clear, that even if the instrument is executed as the deed of the party in the usual manner, yet if it is delivered upon a condition or is accompanied by an agreement suspending its operation until some future time or event, this will constitute it an escrow (f). **2460.**

Delivery  
may be  
either abso-  
lute or  
conditional.

The time of the delivery of a deed is presumed to be the time of its date, unless the contrary appears (g).

Time of  
delivery.

### 2461.

V. It is usual for witnesses to attest the acts of signing, sealing, and delivery, by the subscription of their names to a form of words to that effect written

V. Attestation.

(a) 4 Cruise T. 32, c. 2, § 73.

(b) See 3 Jarm. & Byth. by Sweet, 31; 4 Cruise T. 32, c. 2, § 75.

(c) 4 Cruise T. 32, c. 2, § 75; 2 Bl. Com. 307.

(d) 1 Pres. Shep. T. 58, 59; 4 Cruise T. 32, c. 2, § 75, 79, 80; Co. Litt. 36 a.

(e) See Co. Litt. 36 a; 1 Pres. Shep. T. 58; 4 Cruise T. 32, c. 2, § 79, 80.

(f) 3 Jarm. & Byth. by Sweet, 30; *Nash v. Flynn*, 1 J. & L. 162; *Gudgen v. Besset*, 6 El. & Bl. 986; *Watkins v. Nash*, L. R. 23 Eq. 262.

(g) 4 Cruise T. 32, c. 20, § 4.

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Ch. 7, s. 2.

at the foot or on the back of the deed (a). But neither the attestation itself, nor any kind of attestation clause, is essential to the validity of any deed, unless it is made in the exercise of a power which has prescribed that as a requisite circumstance (b). But the practice is highly important as furnishing an evidence of authenticity. **2462.**

VI. Assent  
of the  
grantee.

VI. The assent of the grantee, in the absence of evidence to the contrary, is always presumed; so that, even where the grantee does not execute the deed, it transfers the estate to him. But he may disclaim it if he pleases; in which case it becomes divested (c). **2463.**

VII. Rights  
of purchaser  
as to execu-  
tion.

[VII. In the case of a sale made after the 31st of December, 1881, the purchaser cannot insist upon the execution in his presence, or in the presence of his solicitor, of the conveyance to him; but he may, at his own cost, have the execution attested by his solicitor, or some other person appointed by him (d).] **2463a.**

### SECTION III.

#### *Of the Registration of Deeds.*

Pr.III. T.12,  
Ch. 7, s. 3.

I. Registra-  
tion in  
Yorkshire  
and Middle-  
sex.

What are  
required  
to be  
registered.

I. By stat. 2 & 3 Anne c. 4, 5 Anne c. 18, 6 Anne c. 35, and 8 Geo. 2, c. 6, memorials of all deeds relating to hereditaments in the West, East, and North Ridings of the county of York, and the town and county of the town of Kingston-upon-Hull, except those relating to copyholds, leases at rack rent, and leases not exceeding twenty-one years where the actual occupation goes with the lease, may be registered, at the election of the parties, and have the registrar's certificate indorsed on them (e). And by 7 Anne c. 20, similar regulations

(a) Burton, § 445.

2445—8.

(b) 4 Cruise T. 32, c. 2, § 81;  
Burton, § 450.

(d) Stat. 44 & 45 Vict. c. 41, s.  
8, in Appendix.

(c) 4 Cruise T. 32, c. 26, § 2;  
Burton, § 441. See *supra*, par.

(e) 4 Cruise T. 32, c. 23, § 2—6,  
8; Sugd. Concise View, 582.



are made for registering deeds in the county of Middlesex; but this Act does not extend to chambers in Serjeants' Inn, or the Inns of Court and Chancery, nor to any messuages, lands, or tenements in the City of London (*a*). **2464.**

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CH. 7, § 3.

Lord St. Leonards remarks (*b*), that it is advisable to register such leases of copyhold estates as would require registry if the estate were freehold; and that if leases not exceeding twenty-one years, where the actual occupation goes along with the lease, are assigned by way of mortgage, it is always usual in practice to require them to be registered. A lease must be registered, notwithstanding the registry of an assignment in which it is recited. But an assignment of a legacy charged on land does not require to be registered (*c*). **2465.**

Even an agreement to execute a mortgage requires registration (*d*). **2465a.**

A memorandum of further charge requires registration as much as the original mortgage; and, for want of it, will be postponed to a second registered mortgage without notice of such further charge (*e*). **2466.**

The memorials are to contain the date, the names, and additions of the parties and witnesses, and the parcels, as or to the same effect as in the original instrument (*f*). But with respect to the parcels, it is provided, that where there are more writings than one for making or perfecting any conveyance or security which concerns the same estates, it shall be a sufficient memorial thereof, if all the estates are only once named in the memorial of any one of the deeds or writings, with a reference to such

Mode of  
registration.

(*a*) 4 Cruise T. 32, c. 28, § 7; 170; *In re Wight's Mortgage Trust*, Sugd. Concise View, 582. L. R. 16 Eq. 41.

(*b*) Sugd. Concise View, 581.

(*c*) *Credland v. Potter*, L. R. 18

(*c*) Sugd. Concise View, 577, 578; 4 Cruise T. 32, c. 28, § 13. Eq. 350; 10 Ch. Ap. 8.

(*d*) *Nere v. Pennell*, 2 H. & M.

(*f*) 1 Cruise T. 32, c. 28, § 4.

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deed or writing in the other deeds or writings, and directions how to find the registering of the same. This provision has been unwarrantably extended in practice; so that, for instance, it is usual in a memorial of an assignment of a lease to refer for the parcels to the prior registry of the lease (*a*). The Acts require the memorial to be under the hand and seal of some or one of the grantors or grantees, his or their heirs, executors, administrators, guardians, or trustees, attested by two witnesses, one thereof to be one of the witnesses to the execution of the deed; and he is to prove on oath both the execution of the memorial and of the deed itself (*b*). **2467.**

By the 18th section of the stat. 6 Anne c. 35, relating to the East Riding and the town and county of the town of Kingston-upon-Hull, enrolment of deeds of bargain and sale is to serve instead of registering a memorial thereof (*c*). **2468.**

Effect of  
registration.

The effect of the Register Acts is merely to render a prior deed fraudulent and void as to a purchaser or mortgagee under a subsequent deed, unless such prior deed is registered before such subsequent deed (*d*); or unless such purchaser or mortgagee has had notice of such prior deed (*e*). **2469.**

II. Regis-  
tration of  
deeds  
relating to  
property  
within the  
Bedford  
Level.

II. By the stat. 15 Car. 2, c. 17, s. 8, for settling the draining of Bedford Level, it is enacted, that all conveyances by indenture of the 95,000 acres contained within the said Level, or any part thereof, entered with the Registrar of the corporation, in a book to be kept for that purpose, shall be of equal force to convey the freehold and inheritance thereof, as if the same conveyances by indenture were for valuable considerations of money enrolled

(*a*) Sugd. Concise View, 580—1.

(*b*) Sugd. Concise View, 579.

(*c*) 4 Cruise T. 32, c. 28, § 6.

(*d*) See 4 Cruise T. 32, c. 28, § 2,

10; Sugd. Concise View, 577.

(*e*) See *supra*, par. 2405.

within six months in one of the King's Courts of Record at Westminster; and no lease, grant, or conveyance of or charge upon the same, except leases for seven years or under in possession, shall be of force but from the time it shall be entered with the Registrar (a). **2470.**

Pr. III. T. 12,  
Ch. 7, s. 3.

III. [By the stat. 17 & 18 Vict. c. 36, and the stat. 29 & 30 Vict. c. 96, provisions were made for the registration of bills of sale and for the renewal of such registration; but these Acts have been repealed by stat. 41 & 42 Vict. c. 31 (Appendix), which is amended by stat. 45 & 46 Vict. c. 43 (Appendix). The former Act enacts, by s. 10, that "A bill of sale shall be attested and registered under this Act in the following manner: (1) The execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor (b); (2) Such bill, with every schedule or inventory thereto annexed or therein referred to, and also a true copy of such bill and of every such schedule or inventory, and of every attestation of the execution of such bill of sale, together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same (or in case the same is made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process issued), and of every attesting witness to such bill of sale, shall be presented to and the said copy and affidavit shall be filed with the registrar within seven clear days after the making or giving of such bill of sale, in like manner as a warrant of attorney in any personal

III. Regis-  
tration of  
bills of sale.

Mode of  
registering  
bills of sale.

(a) 4 Cruise T. 32, c. 28, § 33. & 46 Vict. c. 43, s. 10, *infra*, par.  
(b) This is repealed by stat. 45 2482.

PT. III. T. 12,  
CH. 7, s. 3.

[action given by a trader is now by law required to be filed; (3) If the bill of sale is made or given subject to any defeasance or condition, or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith and as part thereof, otherwise the registration shall be void. In case two or more bills of sale are given, comprising in whole or in part any of the same chattels, they shall have priority in the order of the date of their registration respectively as regards such chattels. A transfer or assignment of a registered bill of sale need not be registered." **2471.**

Renewal of  
registration.

And by s. 11, "The registration of a bill of sale, whether executed before or after the commencement of this Act, must be renewed once at least every five years, and if a period of five years elapses from the registration or renewed registration of a bill of sale without a renewal or further renewal (as the case may be), the registration shall become void. The renewal of a registration shall be effected by filing with the registrar an affidavit stating the date of the bill of sale and of the last registration thereof, and the names, residences, and occupations of the parties thereto as stated therein, and that the bill of sale is still a subsisting security. Every such affidavit may be in the form set forth in the Schedule (A.) to this Act annexed. A renewal of registration shall not become necessary by reason only of a transfer or assignment of a bill of sale (a)." **2472.**

Form of  
register.

Also by s. 12, "The registrar shall keep a book (in this

(a) Re-registration is equally necessary when the original grantee assigns before the expiration of the

five years, *Karet v. The Kosher Meat Supply Association*, L. R. 2 Q. B. D. 361.

[Act called 'the register') for the purposes of this Act, and shall, upon the filing of any bill of sale or copy under this Act, enter therein in the form set forth in the second schedule (B.) to this Act annexed, or in any other prescribed form, the name, residence, and occupation of the person by whom the bill was made or given (or in case the same was made or given by any person under or in the execution of process, then the name, residence, and occupation of the person against whom such process was issued, and also the name of the person or persons to whom or in whose favour the bill was given), and the other particulars shown in the said schedule or to be prescribed under this Act, and shall number all such bills registered in each year consecutively, according to the respective dates of their registration. Upon the registration of any affidavit of renewal the like entry shall be made, with the addition of the date and number of the last previous entry relating to the same bill, and the bill of sale or copy originally filed shall be thereupon marked with the number affixed to such affidavit of renewal. The registrar shall also keep an index of the names of the grantors of registered bills of sale with reference to entries in the register of the bills of sale given by each such grantor. Such index shall be arranged in divisions corresponding with the letters of the alphabet, so that all grantors whose surnames begin with the same letter (and no others) shall be comprised in one division, but the arrangement within each such division need not be strictly alphabetical." **2473.**

By s. 14, "Any judge of the High Court of Justice on being satisfied that the omission to register a bill of sale or an affidavit of renewal thereof within the time prescribed by this Act, or the omission or mis-statement of the name, residence, or occupation of any person, was accidental or due to inadvertence, may in his discretion

Rectification  
of register.

Pr. III. T. 12,  
CH. 7, s. 3.

[order such omission or mis-statement to be rectified by the insertion in the register of the true name, residence, or occupation, or by extending the time for such registration on such terms and conditions (if any) as to security, notice by advertisement or otherwise, or as to any other matter, as he thinks fit to direct." **2474.**

Entry of  
satisfaction.

And by s. 15, "Subject to and in accordance with any rules to be made under and for the purposes of this Act, the registrar may order a memorandum of satisfaction to be written upon any registered copy of a bill of sale upon the prescribed evidence being given that the debt (if any) for which such bill of sale was made or given has been satisfied or discharged." **2475.**

Registration of a prior security is necessary even as against an execution creditor who had notice of it at the time when his (the execution creditor's) debt was incurred (*a*). **2476.**

An agreement to execute a bill of sale does not require registration, qua agreement; but it cannot be treated as amounting to an equitable assignment, or assurance, without registration (*b*). **2477.**

The Bills of Sales Act applies only to secret dispositions of goods which remain, after the assignment, in the apparent possession of the party executing the bill of sale; and therefore where the possession of the property conveyed is given at the same time the deed is executed, no registration is necessary (*c*). **2478.**

[Growing crops, when assigned together with any interest in the land on which they grow, are not "personal chattels" within the Act, but when separately assigned or charged they are included in the Act. Also

(*a*) *Edwards v. Edwards*, L. R. 2 Ch. D. (Ap.) 291.

(*b*) *Ex parte Mackay, Ex parte Brown, In re Jearons*, L. R. 8 Ch. Ap. 643; *Ex parte Conning. In re*

*Steele*, L. R. 16 Eq. 414; *Edwards v. Edwards*, L. R. 2 Ch. D. (Ap.) 291.

(*c*) Hunt on Bills of Sale, 95; *Ex parte Izard, In re Cook*. L. R. 9 Ch. Ap. 271, 277.

fixtures (not being trade machinery) when assigned with any interest in the land or building to which they are affixed are not such "personal chattels," but when separately assigned or charged, they are within the Act (a).] **2479.**

PT.III. T.12,  
CH. 7, s. 3.

Where the grantee of a bill of sale puts a man in possession, and advertises the goods as to be sold under the bill of sale, though they are still in the house of the grantor, they are no longer in his "apparent possession," and therefore the bill of sale, though it be not registered, is valid against an execution on the goods of the grantor (b). But if a man is simply put into possession, and everything is used by the debtor as before, the goods still remain in his apparent possession (c). **2480.**

[By stat. 45 & 46 Vict. c. 43 (Appendix), which came into operation on the 1st day of November, 1882, it is enacted, s. 3, "The Bills of Sale Act, 1878, is hereinafter referred to as 'the principal Act,' and this Act shall, so far as is consistent with the tenor thereof, be construed as one with the principal Act; but unless the context otherwise requires shall not apply to any bill of sale duly registered before the commencement of this Act so long as the registration thereof is not avoided by non-renewal or otherwise" (d). **2481.**

Also by s. 8, "Every bill of sale shall be duly attested, and shall be registered under the principal Act within seven clear days after the execution thereof, or if it is executed in any place out of England, then within seven clear days after the time at which it would in the ordinary course of post arrive in England if posted immediately after the execution thereof; and shall truly

(a) See section 4 in Appendix. L. R. 9 Ch. Ap. 697.

(b) *Emanuel v. Bridger*, L. R. 9 Q. B. 286.

(c) *Ex parte Jay, In re Blenkhorn*,

(d) *Ex parte Izard, In re Chapple*. L. R. 23 Ch. D. (Ap.)

409.

PT. III. T. 12,  
CH. 7, s. 8.

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[set forth the consideration for which it was given; otherwise such bill of sale shall be void in respect of the personal chattels comprised therein;” and s. 10, “The execution of every bill of sale by the grantor shall be attested by one or more credible witness or witnesses, not being a party or parties thereto. So much of s. 10 of the principal Act as requires that the execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and that the attestation shall state that before the execution of the bill of sale, the effect thereof has been explained to the grantor by the attesting witness, is hereby repealed.” **2482.**

And by s. 11, “Where the affidavit (which under s. 10 of the principal Act is required to accompany a bill of sale when presented for registration) describes the residence of the person making or giving the same or of the person against whom the process is issued to be in some place outside the London bankruptcy district as defined by the Bankruptcy Act, 1869, or where the bill of sale describes the chattels enumerated therein as being in some place outside the said London bankruptcy district, the registrar under the principal Act shall forthwith and within three clear days after registration in the principal registry, and in accordance with the prescribed directions, transmit an abstract in the prescribed form of the contents of such bill of sale to the County Court registrar in whose district such places are situate, and if such places are in the districts of different registrars to each such registrar. Every abstract so transmitted shall be filed, kept, and indexed by the registrar of the County Court in the prescribed manner, and any person may search, inspect, make extracts from, and obtain copies of the abstract so registered in the like manner and upon the like terms as to payment or otherwise as near as may be as in the



[case of bills of sale registered by the registrar under the principal Act." **2483.**

PT. III. T. 12,  
CH. 7, s. 3.

By s. 13, "All personal chattels seized or of which possession is taken after the commencement of this Act, under or by virtue of any bill of sale (whether registered before or after the commencement of this Act), shall remain on the premises where they were so seized or so taken possession of, and shall not be removed or sold until after the expiration of five clear days from the day they were so seized or so taken possession of." **2484.**

By s. 16 provision is made for the inspection of registered bills of sale on the terms mentioned in that section. **2485.**

The stats. 41 & 42 Vict. c. 31, and 45 & 46 Vict. c. 43, do not extend to Scotland or to Ireland (a).] **2486.**

Twenty-one days being [formerly] allowed to the grantee to register a bill of sale, it has been held, that by renewing it from time to time before the expiration of each period of twenty-one days, by substituting a fresh one, the revenue may be evaded, and the object of the statute may be defeated; which was the protection of persons who might be dealing with the grantor on the faith of his apparent ownership of the goods. It has [also] been held that the substitution of a fresh bill of sale annuls the prior one; and that if the first was for valuable consideration, that will support the final one if registered within twenty-one days from the making thereof, against an execution creditor (b). **2487.**

#### SECTION IV.

##### *Of the Enrolment of Deeds.*

Deeds are sometimes enrolled for safe custody, that is, they are transcribed upon the records of one of the

PT. III. T. 12,  
CH. 7, s. 4.

Enrolment

(a) *As to registration under the Land Registry Act*, see *supra*, par. 1507—14.

(b) *Smale v. Burr*, L. R. 8 C. P.

Pr. III. T. 12,  
Ch. 7, s. 4

deeds for  
safe custody.

Queen's Courts at [the Royal Courts of Justice] or at a Court of quarter sessions (*a*). The enrolment of a deed does not make it a record, but it thereby becomes a deed recorded (*b*). **2488.**

Enrolment  
of deeds re-  
lating to he-  
reditaments  
in London.

Deeds conveying or affecting lands or tenements in London, or any interest therein, may be enrolled either in the Hustings of Pleas of Land or Common Pleas, the execution thereof being first acknowledged before the Mayor or the Recorder and one Alderman, and proclamation thereof being made at one of these Courts (*c*). **2489.**

## SECTION V.

### *Of the Possession and Transfer of Title Deeds.*

Pr. III. T. 12,  
Ch. 7, s. 5.

Right to  
possession  
of deeds.

The immediate freeholder has, both at law and in equity, a *primâ facie* title to the possession of the deeds (*d*). A legal tenant for life of freeholds is entitled to the custody of the title deeds; and the Court will not interfere as between him and the remainderman, except where the deeds would be in danger if left in the hands of the tenant for life; or where the Court requires the deeds for the purpose of dealing with the property (*e*). **2490.**

Delivery up  
of title deeds  
by a  
jointress  
or dowress.

A jointress or dowress will not be compelled to deliver up title deeds, unless the person applying for them not only offers to confirm, but does absolutely confirm, the jointure or dower (*f*). **2491.**

64; *Ramsden v. Lupton*, L. R. 9 Q. B. (Ex. Ch.) 17. On the subject of Bills of Sale, see Lyon and Redman's most useful and compendious work; and see the Bills of Sale Act, 1878, 41 & 42 Vict. c. 31, and the Bills of Sale Act (1878) Amendment Act, 1882, 45 & 46 Vict. c. 43, in the Appendix.

(*a*) 4 Cruise T. 32, c. 28, § 34.

(*b*) 4 Cruise T. 32, c. 28, § 35.

(*c*) 1 Jarm. & Byth. by Sweet, 263. As to the enrolment of annuity deeds and deeds of bargain and sale, see *supra*, par. 39—40a, 1884.

(*d*) 9 Jarm. & Byth. by Sweet, 90; *Allgood v. Heywood*, 1 Hurl. & Colt. 745.

(*e*) *Leathes v. Leathes*, L. R. 5 Ch. D. 221.

(*f*) 1 Cruise T. 7, c. 2, § 12, 14.

The right to title deeds, like that to other personal property when in actual possession, may be transferred either by deed or by delivery made with that intention; but if not transferred, it descends with the land (a), and passes with it by conveyance, without being named (b). It is advisable, however, to add a grant of the deeds, where the purchaser is entitled to the custody of them (c). **2492.**

PT.III. T.12,  
CH. 7, s. 5.

Transfer  
and trans-  
mission of  
deeds.

## SECTION VI.

### *(f) Attested Copies and Covenants for Production of Documents of Title.*

Where property is sold in lots or parcels, either at one time or at several times, or where only a part of the property is sold, and there are documents of title which relate to the whole, it is usual for the person who keeps the deeds to enter into a covenant with the owner or owners of the other part or parts, for the production, at the expense of the covenantee or covenantees, of the documents of title so kept, whenever it shall be necessary for the manifestation or support of the title of the covenantee or covenantees. Sometimes the vendor retains the documents, and enters into this covenant with a purchaser or purchasers, especially where he retains the most valuable part of the estate. At other times, a purchaser, especially of the part of the greatest value, retains the documents, and enters into such a covenant with the vendor, or with the other purchaser or purchasers (d). A covenant for production of deeds should in most cases be by a separate deed (e). **2493.**

PT.III. T.12,  
CH. 7, s. 6.

General rule.

In the absence of a stipulation to the contrary, the

(a) Burton, § 476.

(b) Sugd. Concise View, 322.

(c) Sugd. Concise View, 416.

(d) 4 Cruise T. 32, c. 25, § 97;

Burton, § 475, 582; 9 Jarm. & Byth.

by Sweet, 4, 5; see stat. 37 & 38 Vict.

c. 78, s. 2, in Appendix; par. 2496a.

(e) Sugd. Concise View. 334.

Pr. III. T. 12,  
Ch. 7, s. 6.

documents  
a purchaser  
is entitled to  
attested  
copies and  
a covenant  
for produc-  
tion.

This cove-  
nant runs  
with the  
land.

Assignees in  
bankruptcy  
bound.

Use of at-  
tested  
copies.

Acknow-  
ledgment of  
right to  
production,  
and under-  
taking for  
safe custody  
of docu-  
ments.

purchaser is entitled to attested copies and a covenant for the production of every document which the vendor is obliged to state in his abstract, and which is not delivered up to him, except documents on record, copies of court rolls (unless in the possession or power of the vendor), wills proved in the Ecclesiastical or Probate Courts, bargains and sales enrolled under the stat. 10 Anne c. 18, and generally documents preserved in some general or quasi-public repository, from whence copies may be obtained that will be admissible as primary evidence (a). And this covenant, being real, will run with the land conveyed for the benefit of all future purchasers of it, without a fresh covenant on a re-sale. But if the deed containing such covenant be not delivered to a future purchaser, he will then be entitled to a new covenant from the vendor for the production of the title deeds (b). **2494.**

Even assignees in bankruptcy [were] bound, at the expense of the estate, to furnish the purchaser with attested copies of the deeds which they [retained,] and to covenant for the production of the originals so long as they [remained] in office (c). **2495.**

Attested copies are useless as against strangers, and cannot be used on an ejectment, unless perhaps as between the parties themselves (d). **2496.**

[An important innovation is made in the law relating to the production and safe custody of title deeds by stat. 44 & 45 Vict. c. 41, s. 9 (Appendix), which enacts that, “(1) Where a person retains possession of documents, and gives to another an acknowledgment in writing of the right of that other to production of those documents, and to delivery of copies thereof (in this section

(a) 9 Jarm. & Byth. by Sweet, 69; and see stat. 37 & 38 Vict. c. 78, s. 2 in Appendix; Sugd. Concise View, 331—333: par. 2496a.

(b) 4 Cruise T. 32, c. 25, § 97.  
(c) 9 Jarm. & Byth. by Sweet, 70; Sugd. Concise View, 334.  
(d) Sugd. Concise View, 334.

[called an acknowledgment), that acknowledgment shall have effect as in this section provided. (2) An acknowledgment shall bind the documents to which it relates in the possession or under the control of the person who retains them, and in the possession or under the control of every other person having possession or control thereof from time to time, but shall bind each individual possessor or person as long only as he has possession or control thereof; and every person so having possession or control from time to time shall be bound specifically to perform the obligations imposed under this section by an acknowledgment, unless prevented from so doing by fire or other inevitable accident. (3) The obligations imposed under this section by an acknowledgment are to be performed from time to time at the request in writing of the person to whom an acknowledgment is given, or of any person, not being a lessee at a rent, having or claiming any estate, interest, or right through or under that person, or otherwise becoming through or under that person interested in or affected by the terms of any document to which the acknowledgment relates. (4) The obligations imposed under this section by an acknowledgment are:—

(i.) An obligation to produce the documents or any of them at all reasonable times for the purpose of inspection, and of comparison with abstracts or copies thereof, by the person entitled to request production or by any one by him authorised in writing; and

(ii.) An obligation to produce the documents or any of them at any trial, hearing, or examination in any Court, or in the execution of any commission, or elsewhere in the United Kingdom, on any occasion on which production may properly be required, for proving or supporting the title or claim of the person entitled to request production, or for any other purpose relative

PT.III. T.12,  
CH. 7, s. 6.

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[to that title or claim; and (iii.) An obligation to deliver to the person entitled to request the same true copies or extracts, attested or unattested, of or from the documents or any of them. (5) All costs and expenses of or incidental to the specific performance of any obligation imposed under this section by an acknowledgment shall be paid by the person requesting performance. (6) An acknowledgment shall not confer any right to damages for loss or destruction of, or injury to, the documents to which it relates, from whatever cause arising. (7) Any person claiming to be entitled to the benefit of an acknowledgment may apply to the Court for an order directing the production of the documents to which it relates, or any of them, or the delivery of copies of or extracts from those documents or any of them to him, or some person on his behalf; and the Court may, if it thinks fit, order production, or production and delivery, accordingly, and may give directions respecting the time, place, terms, and mode of production or delivery, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application. (8) An acknowledgment shall by virtue of this Act satisfy any liability to give a covenant for production and delivery of copies of or extracts from documents. (9) Where a person retains possession of documents and gives to another an undertaking in writing for safe custody thereof, that undertaking shall impose on the person giving it, and on every person having possession or control of the documents from time to time, but on each individual possessor or person as long only as he has possession or control thereof, an obligation to keep the documents safe, whole, uncanceled, and undefaced, unless prevented from so doing by fire or other inevitable accident.

[(10) Any person claiming to be entitled to the benefit of such an undertaking may apply to the Court to assess damages for any loss, destruction of, or injury to the documents or any of them, and the Court may, if it thinks fit, direct an inquiry respecting the amount of damages, and order payment thereof by the person liable, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application. (11) An undertaking for safe custody of documents shall by virtue of this Act satisfy any liability to give a covenant for safe custody of documents. (12) The rights conferred by an acknowledgment or an undertaking under this section shall be in addition to all such other rights relative to the production, or inspection, or the obtaining of copies of documents as are not, by virtue of this Act, satisfied by the giving of the acknowledgment or undertaking, and shall have effect subject to the terms of the acknowledgment or undertaking, and to any provisions therein contained. (13) This section applies only if and as far as a contrary intention is not expressed in the acknowledgment or undertaking. (14) This section applies only to an acknowledgment or undertaking given, or a liability respecting documents incurred after the commencement of this Act.”] **2496a.**

PT. III. T. 12,  
CH. 7, S. 6.

## SECTION VII.

### *Of Mistakes in Deeds (a).*

Evident omissions and mistakes may be supplied and rectified (b). **2497.**

PT. III. T. 12,  
CH. 7, S. 7.

Where it is evident from the nature of the case or

Correction  
thereof.

(a) For some other points connected with the subject of Mistake, the reader is referred to the Index,

tit. “Mistake.”

(b) 4 Cruise T. 32, c. 19, § 29, 31.

Pr. III.T.12,  
Ch. 7, s. 7.

Name of one  
party insert-  
ed in a sti-  
pulation,  
instead of  
name of the  
other.

from the rest of the deed, that the name of one of the parties was inserted by mistake for the name of the other, such a mistake will be corrected: as where by articles of separation it was stipulated that the trustees should indemnify the husband against his own debts, instead of his wife's debts (*a*). **2498.**

Conveyance  
of more or  
less than  
was sold.

If a man clearly purchases an estate by a particular of sale, and in the conveyance part of the land is left out, equity will relieve him. And, on the other hand, it will relieve a vendor, where more land has passed than was contracted for (*b*). **2499.**

Instrument  
not what  
was intend-  
ed, or there  
is a mistake,  
or necessary  
acts are  
omitted.

Where by mistake an instrument inter vivos is not what the parties intended, or there is a mistake in it other than a mistake in law, or any acts necessary to give validity to the instrument have been omitted, and the mistake is clearly made out by admissible and satisfactory evidence, or is admitted by the defendant, equity will rectify the same (*c*), except as against a bonâ fide purchaser for valuable consideration without notice (*d*), or other person having an equity equal to that of the plaintiff (*e*), such as the issue in tail, or a remainderman in tail, where there is no equity to affect the conscience of such issue or remainderman (*f*). But in order to enable the Court to rectify an ante-nuptial settlement by striking out a part, it must be proved that it contains something which has been inserted by mistake, contrary to the intention of *all* the parties (*g*). **2500.**

(*a*) *Wilson v. Wilson*, 5 H. L. Cas. 40, 52—7, 59, 63—71.

(*b*) Sugd. Concise View, 231.

(*c*) Story's Eq. Jur. § 152, 157, 159, 166, 168, and see Sugd. Concise View, 117; *Meadows v. Meadows*, 16 Beav. 401; *Murray v. Parker*, 19 Beav. 305; *Torre v. Torre*, 1 Sm. & G. 518; *Re Morse's Settlement*,

21 Beav. 174; *Wright v. Goff*, 22 Beav. 207; *Wolterbeek v. Barrow*, 23 Beav. 423.

(*d*) Story's Eq. Jur. § 165; 2 Spence's Eq. Jur. 195.

(*e*) Story's Eq. Jur. § 176.

(*f*) Story's Eq. Jur. § 178.

(*g*) *Rooke v. Lord Kensington*, 2 K. & J. 753, 764.



Where an instrument is substantially what the parties intended, although so framed under a mistaken view of the law, the Court will not rectify the mistake (a). A bond to leave or convey property has, however, been sometimes upheld in equity as an agreement defectively executed (b). **2501.**

Pr.III. T.12,  
Ch. 7, s. 7.

Instrument  
not calcu-  
lated to ef-  
fect intend-  
ed purpose.

A Court of Equity will not remedy a defect or supply an omission in a deed in favour of a stranger, where there is no consideration, even in the plainest case, and even when it has arisen from a mere mistake, and though the correction would not be inconsistent with the deed (c). **2502.**

Where mis-  
take not  
remedied in  
favour of a  
stranger.

Where the final instrument of conveyance or settlement differs from the preliminary contract, that very circumstance affords of itself some grounds for presuming an intentional change of purpose, unless, from some recital in it, or from some attendant circumstances, it appears to have been intended to be merely in pursuance of the original contract (d). **2503.**

Variances  
between  
final instru-  
ment and  
preliminary  
contract.

As regards the admissibility of the evidence, it is a rule of the common law, independently of the Statute of Frauds, that parol evidence is not admissible to disannul, substantially add to, subtract from, qualify, or vary a written instrument (e). But cases of accident, mistake, fraud, menace, and duress, are exceptions to this rule (f). **2504.**

Evidence  
of mistake.

## SECTION VIII.

### *Of Alterations in Deeds.*

A deed should not be in any way altered after delivery, but any alteration that may be requisite should

Pr.III. T.12,  
Ch. 7, s. 8

Alterations

- (a) Story's Eq. Jur. § 113—115. 158; and see also Sugd. Concise  
(b) Story's Eq. Jur. § 136; 2 View, ch. 3, sects. 8, 9; Best on  
Spence's Eq. Jur. 886. Evid. 3rd ed. 302.  
(c) 2 Spence's Eq. Jur. 886. (f) Story's Eq. Jur. § 155, 156.  
(d) Story's Eq. Jur. § 160. 161, notes; Best on Evid. 3rd ed.  
(e) See Story's Eq. Jur. § 153, 306.

Pr. III. T. 12,  
Ch. 7, s. 8.

should be  
made before  
execution.

be made before the execution of the deed. Any alteration made before the delivery of the deed, by whomsoever made, will not invalidate the deed; for in that case the addition constitutes part of the deed as it originally began to operate (a). 2505.

When inter-  
lineations  
are presum-  
ed to have  
been made.

An interlineation, if nothing appears to the contrary, will be presumed to have been made at the time when the deed was executed, and not afterwards; because a deed cannot be altered after it is executed without fraud or wrong, which will not be presumed. But an erasure or alteration in a suspicious place must be explained by the party seeking to enforce the instrument (b). 2506.

Modern  
practice.

The modern practice is, when any alteration, interlineation, or erasure is made in a deed before it is executed, to take notice of it in the attestation (c). 2507.

Immaterial  
alterations.

It would seem, however, that at the present day no deed would be held void on account of any immaterial alteration, after execution, by whomsoever made (d). 2508.

Material  
alterations.

An alteration, even in a material part, by a stranger or a mere spoliator, without the consent of the party benefited, would not invalidate a deed (e). But an erasure or alteration made in a material part by the party benefited, at least if the alteration is in his own favour, may make a deed void as against the opposite party (f). 2509.

Any alteration made after the execution of a deed by any one of the parties, leaves the deed valid as to him, provided the alteration has not affected the situation in which he stood (g). 2510.

(a) 1 Pres. Shep. T. 69.

(b) 4 Cruise T. 32, c. 26, § 14; Burton, § 443; Best on Evid. 3rd ed. 309; *Doe d. Tatum v. Catomore*, 16 Ad. & E. (N. S.) 745.

(c) 4 Cruise T. 32, c. 26, § 15.

(d) 3 Jarm. & Byth. by Sweet, 18; Best on Evid. 309. But see 4

Cruise T. 32, c. 26, § 13.

(e) See 4 Cruise T. 32, c. 26, § 12; 1 Pres. Shep. T. 69; Burton, § 443.

(f) See Burton, § 443; 4 Cruise T. 32, c. 26, § 12, 13; 2 Bl. Com. 308. But see 3 Jarm. & Byth. by Sweet, 18, 19.

(g) 4 Cruise T. 32, c. 26, § 12, n.

## SECTION IX.

*Of the Construction of Deeds.*I. *General Rules of Construction of Deeds (a).*

I. All deeds shall be construed favourably, so as to support them and effectuate the apparent intention of the parties, as far as possible, consistently with the rules of law. Verba intentioni, non e contra, debent inservire (b). 2511.

Pr.III. T.12,  
CH. 7, s. 9.

I. Intention  
to be effec-  
tuated.

II. The intention must not be imputed by mere conjecture, but must be collected from the deed itself (c). And, in general, when there is no ambiguity in the words, no construction is to be made contrary to the words (d). Exceptions occur to this rule in cases where a construction is adopted in furtherance of the general or paramount intention, contrary to words merely expressive of a particular or subordinate intention (e), and also in cases where an instrument is allowed to operate in a different way from that which was intended (f). 2512.

II. Inten-  
tion to be  
collected  
from the  
words, and  
construc-  
tion to be  
according to  
the words.

III. As a general rule, words are to be construed in their strict and proper sense. Thus, where a person agrees not to carry on a business or profession in London, the word has been taken in its primary and strictly correct sense of the city of London, and not in its popular and colloquial sense, although the party in whose favour such agreement is entered into is not carrying on that profession or trade in the city of London, but in another part of the metropolis; at least, this is the case where

III. When  
words are to  
be taken in  
their strict  
sense.

(a) For other rules of construction of deeds and other instruments inter vivos, the reader is referred to the specific heads to which they belong.

(b) 4 Cruise T. 32, c. 19, § 2; 2 Bl. Com. 379, 380; Burton, § 503;

1 Pres. Shep. T. 86, 253, n.

(c) See Burton, § 504, 510.

(d) 2 Bl. Com. 379; 4 Cruise T. 32, c. 19, § 4.

(e) See supra, par. 407 et seq.

(f) See infra, par. 2524.

Pr. III. T. 12,  
Ch. , s. 9

that party, by describing the locality of his place of business as situate in the county of Middlesex, has shown that he knew that it was not in the city of London (*a*). But words are not to be construed according to their strict and proper acceptation, where, from the context of the instrument, they appear to be used in a different sense; or where they are incapable of being carried into effect in their strict sense (*b*); for in such a case, qui hæret in literâ hæret in cortice (*c*). And hence, in a deed, as well as in a will, "or" may be construed to mean "and," and "and" may be construed to mean "or," if such a construction is necessary to give effect to the intention (*d*). The meaning of a particular word may also be shown by parol evidence to be different in some particular place, trade, or business, from its proper and ordinary acceptation (*e*). And where it is necessary to effectuate the intention, words and clauses may be transposed; the strict grammatical sense may be disregarded; the word "same," though properly referring always to the last antecedent, may, to avoid contradiction, be differently applied (*f*). But in construing statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument (*g*). **2513.**

(*a*) *Mallan v. May*, 13 M. & W. 511.

(*b*) 1 Pres. Shep. T. 87; *Pollock*, B., in *Mallan v. May*, 13 M. & W. 517, 518; *Key v. Key*, 4 D. M. & G. 84, 85.

(*c*) 2 Bl. Com. 379; 4 Cruise T. 32, c. 19, § 4; 1 Pres. Shep. T. 87.

(*d*) 4 Cruise T. 32, c. 19, § 19; Burton, § 510; 1 Jarm. Wills, 2nd ed. 422, 433; *White v. Supple*, 2 Dru. & War. 471; *Pitt v. Pitt*, 22

Beav. 294; *Maynard v. Wright*, 26 Beav. 285.

(*e*) *Pollock*, C. B., in *Mallan v. May*, 13 M. & W. 517, 518.

(*f*) 4 Cruise T. 32, c. 19, § 10—12; Burton, § 509; 1 Pres. Shep. T. 87; 2 Pres. Shep. T. 253, n.

(*g*) Lord *Blackburn*, in *Caledonian Railway Co. v. North British Railway Co.*, L. R. 6 Ap. Cas. 114, 131, quoting Lord *Wensleydale* in *Grey v. Pearson*, 6 H. L. Cas. 61, 106.

IV. If words will bear two senses, one agreeable and another contrary to law, that sense is to be preferred which is most agreeable to law. For example, if a tenant for life makes a lease for life generally, it shall be construed for his own life only, and not for the life of the lessee, which is beyond his power to grant (*a*). And so, under a general conveyance of lands and tenements, copyholds are held not to be included (*b*). **2514.**

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CH. 7, s. 9.

IV. Sense  
agreeable to  
law pre-  
ferred.

V. Generale dictum generaliter est intelligendum, or, verba generaliter dicta generaliter accipienda (*c*). **2515.**

V. Construc-  
tion of gene-  
ral expres-  
sions.

VI. When, however, there are general words, and these are followed by special words which are consistent with them, the deed shall be construed according to the special words. But when a deed first contains special words, and then concludes in general words, both the general words and the special shall stand (*d*). For, in the first case, the general words may be considered as merely introductory; whereas, in the latter case, they could only have been inserted with the view of enlarging the operation of the deed. Yet the extent of general words following special words is often so far limited by the special words, as to be held only to apply to things ejusdem generis (*e*). **2516.**

VI. When  
general  
words are  
to be fol-  
lowed, and  
when spe-  
cial.

VII. Where the words of a deed are so uncertain that the intention of the parties cannot be discovered, the deed will be void (*f*). **2517.**

VII. Uncer-  
tainty.

VIII. The construction should be made, not merely upon particular parts of a deed, but upon the entire deed, so as to give effect, if possible, to every part and every word (*g*). **2518.**

VIII. Con-  
struction to  
be upon the  
whole deed.

(*a*) 2 Bl. Com. 380 ; 4 Cruise T. 32, c. 19, § 18; Burton, § 1332; Co. Litt. 42 a, 183 a.

(*b*) Burton, § 1332.

(*c*) Co. Litt. 36 a.

(*d*) See 4 Cruise T. 32, c. 19, § 9.

(*e*) Supra, par. 1757—8a; *Harper v. Godsell*, L. R. 5 Q. B. 422.

(*f*) 4 Cruise T. 32, c. 19, § 24.

(*g*) 2 Bl. Com. 380 ; 4 Cruise T. 32, c. 19, § 6 ; Burton, § 504, 510 ; 1 Pres. Shep. T. 87.

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IX. Re-  
pugnant  
clauses  
or words.

IX. If one part of a deed is so ambiguously worded, that it is equally capable of two different constructions, one of which is in accordance with, and the other conflicts with another part of the deed, about the meaning of which there is no doubt, the former construction must be adopted (*a*). If there are two clauses in a deed so totally repugnant to each other, that they cannot be reconciled, there, unless contrary to the apparent general intention, the first shall be received and the latter rejected (*b*). But if in any part of an instrument there is or are any clause or words evidently repugnant to the other parts of it, and to the general intention apparent upon the whole instrument, such clause or words will be rejected (*c*). 2519.

X. Con-  
struction  
to be  
reasonable.

X. So far as the apparent intention and the rules of law will admit, the construction ought to be reasonable and agreeable to the common understanding of mankind (*d*). The law itself does not cast an obligation upon a person, unless it is a reasonable one. But if, by express and clear and unqualified words, he engages to do a particular act, he will be under an unqualified liability to do that act, however unreasonable it may be; for *verba generaliter dicta generaliter accipienda*; and it was his own fault that he entered into such a contract. Thus, if a lessee covenants to repair, and keep in repair the demised premises, during the term, without saying "damage by fire excepted," he must rebuild them, if burnt down, even though the landlord may have insured. As, however, it must be assumed that the contracting parties were reasonable men, and intended what was reasonable, or at least what was not preposterous, if the contract, when re-

(*a*) *Herrick v. Sixby*, L. R. 1 P. C. 436, 450.

(*b*) 2 Bl. Com. 381; 4 Cruise T. 32, c. 19, § 8; Burton, § 512.

(*c*) 4 Cruise T. 32, c. 19, § 25; 9 Jarm. & Byth. by Sweet, 85.

(*d*) 2 Bl. Com. 379; 2 Pres. Shep. T. 253, n.

ceived according to the letter without qualification, PT. III. T. 12,  
CH. 7, S. 9. would be not merely an unreasonable one, but a preposterous one, words may be interpolated, so as to qualify their generality, and give them a reasonable construction, unless the words sought to be interpolated would be clearly inconsistent with the language of the contract. And hence if a landlord covenants to repair, it will be construed to mean to repair on notice, or that he will not be liable to an action, unless he have notice of the want of repair; for otherwise he would be in this preposterous position,—if he came to repair, when repair was not needed, he would be a trespasser; if he did not come, he would be liable to an action on the covenant, if repair was needed (a). And on the same principle a grant of common in a manor will extend to commonable places only, and not to gardens, orchards, etc. And so a grant of a right to dig for metals, will not confer a right to dig under the grantor's house, so as to endanger it (b). **2520.**

XI. The words of an indenture are the words of either party. And although they are spoken as the words of the one party only, yet they are not his words alone, but may be applied to the other party, if they more properly belong to him (c). **2521.**

XI. Rule as to the words of an indenture.

XII. Subject to all other rules of exposition, it is a rule that a deed is to be construed most strongly against the grantor, covenantor, or active party, and most favourably to the grantee, covenantee, or person intended to be benefited. *Verba cartarum fortius accipiuntur contra proferentem.* For, the principle of self-interest will make men sufficiently careful not to

XII. Words construed most strongly against the active party.

(a) Woodf. 10th ed. 485, 488—  
*Makim v. Watkinson*, L. R. 6 Ex.  
25, and remarks of the judges.

(b) 1 Pres. Shep. T. 87.  
(c) 1 Pres. Shep. T. 53.

PT. III. T. 12,  
CH. 7, S. 9. prejudice themselves by using words of too extensive a meaning. And those who bind themselves by deed would always adopt ambiguous expressions, if they were afterwards at liberty to put their own construction on them (*a*). And although this applies with more force to a deed poll than to an indenture, in which the words are deemed the words of both, yet the rule applies even in the case of an indenture (*b*).  
**2522.**

XIII. Inadmissibility of averments founded on parol evidence.

XIII. No averment founded on parol evidence, which tends to contradict, or vary, or, in general, even to explain a written agreement concerning lands, shall be admitted, except in certain cases of fraud, accident, or mistake (*c*). But averments founded on parol evidence of collateral facts tending to support or explain a deed have in some cases been admitted; as in the case of an averment of a consideration for a bargain and sale (*d*). In the case of an *ambiguitas patens*, *i.e.*, where the words themselves *primâ facie* import an ambiguity, no parol evidence is admissible to explain it. But in the case of an *ambiguitas latens*, *i.e.*, where there is no ambiguity on the face of the instrument, but an ambiguity can be made to appear from parol evidence, there parol evidence is admissible to explain as well as to raise it. Thus, if it appears by parol evidence that there are two persons or things of the same name, it is allowable to adduce parol evidence in order to remove the ambiguity, by showing which was intended (*e*). And parol

(*a*) 2 Bl. Com. 380; 4 Cruise T. 32, c. 19, § 13; 1 Pres. Shep. T. 88, and n. (81); *Warde v. Warde*, 16 Beav. 103.

(*b*) See Burton, § 511; Co. Litt. 36 a; *Warde v. Warde*, 16 Beav. 103. But see 2 Bl. Com. 380; 4 Cruise T. 32, c. 19, § 17; 1 Pres. Shep. T. 53.

(*c*) 4 Cruise T. 32, c. 19, § 45, 48, 56; Burton, § 508.

(*d*) 4 Cruise T. 32, c. 19, § 49.

(*e*) 4 Cruise T. 32, c. 19, § 53—55; Burton, § 507; Sugd. Concise View, 115; Best on Evid. 3rd ed. 302—5; *Grant v. Grant*, L. R. 5 C. P. 380; Id. (Ex. Ch.) 727; 2 Prob. & M. 8.



evidence is admissible, whether in the case of a deed or of a will, to explain the situation of the parties or the state of the facts at the time, on which the extent of the operation of the deed or will must frequently depend (a).  
**2523.**

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XIV. Where a deed cannot operate in the way intended by the parties, it will be construed in such a manner as to operate, in some other way, if it is possible, consistently with the rules of law and the general intention of the parties. Quando quod ago non valet ut ago, valeat quantum valere potest (b). Thus, a deed, which was intended to operate as a bargain and sale, but was void for want of a pecuniary consideration, has been held to operate as a confirmation (c). And so, if a person having a power of appointment, but no estate, uses the language of conveyance appropriate to the transfer of estates, and not the language appropriate to the exercise of his power, it will be deemed an exercise of his power (d). And on the other hand, the words "limit and appoint" may operate by way of grant (e). So the word "grant" will operate as a confirmation; and the word "confirm" may in some cases operate by way of grant or release (f). So a conveyance in the form of and void as a grant, feoffment, release, bargain and sale, or surrender, may sometimes take effect as a covenant to stand seised (g). So a feoffment may be construed to enure as a surrender (h). And where hereditaments may not pass by way of surrender, on

XIV. Operation of a deed in a different way from what was intended.

(a) 9 Jarm. & Byth. by Sweet, 821; Sugd. Concise View, 115, 116; *Waterpark v. Fennell*, 7 H. L. Cas. 650, 678, 684.

(b) 4 Cruise T. 32, c. 19, § 33; 1 Pres. Shep. T. 82, 87; 2 Pres. Shep. T. 308, 514; Burton, § 505; 4 Jarm. & Byth. by Sweet, 106. But see Co. Litt. 301 b; *Johnson v. Osenton*, L. R. 4 Ex. 107; *Baddeley v. Baddeley*, L. R. 9 Ch. D. 113.

(c) 4 Cruise T. 32, c. 19, § 34; 3 Jarm. & Byth. by Sweet, 591.

(d) Burton, § 505.

(e) 2 Pres. Shep. T. 514.

(f) 3 Jarm. & Byth. by Sweet, 591.

(g) 3 Jarm. & Byth. by Sweet, 670-1; 2 Pres. Shep. T. 514; Watk. Conv. 3rd ed. by Prest. 192, 199, 200.

(h) Watk. Conv. 3rd ed. by Prest. 167.

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account of the existence of an intervening estate, if there are sufficient words in the deed, it may enure and pass the property by way of grant, release, etc. (a). And where one thing is intended to be granted for another so as to operate in the nature of an exchange, but the things cannot pass by way of exchange, they may pass by way of grant (b). Again, a deed purporting to be an assignment of an old term, may, if that term has by any accident ceased, even operate as the creation of a new one (c). And where a conveyance would have some effect, but not all the effect intended, there, to the end that the main design of the parties may be accomplished, the estate shall pass in another way than that which was intended (d). **2524.**

XV. Where  
a deed may  
enure in dif-  
ferent ways.

XV. Where a deed may enure in different ways. the person to whom it is made shall have his election in which way to take it (e). Where a conveyance by the common law and one by the Statute of Uses concur, that by the common law shall be preferred; and therefore, where the lands are conveyed by bargain and sale, and also by feoffment to the bargainee before enrolment, he shall take by the feoffment, unless the bargainor incumbers the estate between the execution of the bargain and sale and the feoffment; for in that case the bargainee shall be in by the bargain and sale, and the enrolment shall relate back in favour of the bargainee (f). **2525.**

An alienation is the lease or grant of the person from whom the right of possession passes, and the confirmation of the other parties till their interest comes into possession; and from that time it is their lease or grant, and the confirmation of the other person. If tenant in tail and the reversioner grant a rent charge in fee, it shall be taken

(a) 2 Pres. Shep. T. 308; Watk. Conv. 3rd ed. by Prest. 192.

(b) 2 Pres. Shep. T. 297.

(c) Sugd. Concise View, 481.

(d) 1 Sugd. Pow. 414.

(e) 4 Cruise T. 32, c. 19, § 42; 1 Pres. Shep. T. 205.

(f) See 4 Cruise T. 32, c. 9, § 39.

to be the grant of the tenant in tail, and the confirmation of the reversioner; but when the tenant in tail dies without issue, it shall be taken to be the sole grant of the reversioner (a). **2526.**

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XVI. When no time is fixed for the beginning of an estate, it shall begin immediately (b). **2527.**

XVI. Com-  
mencement  
of an estate.

XVII. An instrument, of whatever kind it may be, must receive the same construction in every Court. Whatever is its true meaning, must be its meaning everywhere (c). **2528.**

XVII. Same  
construction  
in every  
Court.

XVIII. [A deed expressed to be supplemental to a previous deed, or directed to be read as an annex thereto, is read and takes effect as if indorsed on, or as if it contained a full recital of, the previous deed (d).] **2528a.**

XVIII. Con-  
struction of  
supple-  
mental, or  
annexed  
deed.

## II. *The Construction of particular Expressions in Deeds (e).*

The word "begotten," extends to issue born after the execution of the deed or will, and the words "to be begotten" extend to issue born before (f); unless both these expressions are used, in which case each has its proper signification and efficacy (g). **2529.**

"Begotten,"  
and "to be  
begotten."

Where an act is to be done within a certain number of days "from" a particular day, the day named is excluded from the computation, unless there are special grounds for a different construction (h). **2530.**

"From" a  
certain day.

The expression "heir female" in a deed is deemed to designate such person as would be heir if females only

"Heir fe-  
male."

(a) 1 Pres. Shep. T. 84.

(b) 1 Pres. Shep. T. 108.

(c) 2 Sugd. Pow. 182—3.

(d) See stat. 44 & 45 Vict. c. 41, s. 3 in Appendix.

(e) See Construction of Wills, *infra*, and the Index, tit. "Words," etc., as to certain specific heads, under which the construction of

other expressions is noticed.

(f) 6 Cruise T. 38, c. 10, § 48; 2 Rop. Leg. by White, 15, 13; 2 Jarm. Wills, 2nd ed. 150, 152, 153; *Almack v. Horn*, 1 Hem. & M. 630.

(g) *Gabb v. Prendergast*, 1 K. & J. 439.

(h) 9 Jarm. & Byth. by Sweet, 817.

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were capable of being heirs : so that a daughter may take by that designation, though in consequence of the existence of a son, she is not *very* heir—at least if there are words showing that the word “heir” is not used in the strict technical sense, as where the words “now living” are added (a). **2531.**

“Insolvency.”

The ordinary meaning of the word “insolvency” is an incapacity of paying one’s just debts : unless restricted by the context, it is not limited to the condition of one who has taken the benefit of an Act for the relief of Insolvent Debtors (b). **2532.**

“London.”

It has been held that the word “London,” when used in articles of agreement, and unexplained by express words in the context, is to be understood in its strict and primary sense of “the City of London” ; although, in its popular or colloquial sense, it denotes the cities of London and Westminster, and the borough of Southwark, and the adjacent streets and places ; and although, judging from the general scope and design of the instrument, it was intended to be understood in its popular or colloquial sense. This was decided in a case where an assistant to two surgeon-dentists, who practised in Great Russell Street, Bloomsbury, but had never practised in the City, agreed not to practise in London, or in any of the towns where they had been practising, without their permission. He afterwards practised in Great Russell Street, and yet it was held to be no breach of his agreement (c) ! **2533.**

“Mines,”  
“minerals,”  
“quarries.”

The distinction between a mine and a quarry is, that in mining you only begin on the surface, and by means of a shaft or lateral drift, you work so that you leave a roof overhead. Whereas in quarrying, you remove the surface. A mine, in its general sense, is that out of which some

(a) *Chambers v. Taylor* 2 My. & Cr. 376. *geridge’s Trusts*, 1 Johns. 627.

(b) *Parker v. Gossage*, 2 Cr. M. & R. 617 ; 1 Tyr. & Gr. 105 ; *Re Mug-*

(c) *Mallan v. May*, 13 M. & W. 511. See *supra*, par. 2513.

metal substance is dug by means of sinking shafts or making drifts, but in its strict sense, it may include a place out of which any other substance is so dug. And minerals, in the strict sense, may mean any earthy substance worked by means of a mine or a quarry, or it may mean some metal substance so worked, or it may mean substances dug by means of a mine as distinguished from a quarry (*a*). It will be taken in the first and most comprehensive sense unless there is something, in the context or in the nature of the transaction, to induce the Court to give it a more limited meaning (*b*). **2534.**

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CH. 7, S. 9.

Ordinarily and *primâ facie*, a month, in a contract at law, means a lunar month, except it be a mercantile contract, when it means a calendar month (*c*). **2535.**

Where a father covenants, that, in case he should give one daughter, on her marriage or otherwise, a greater portion than a specified sum in money or value, his executors would pay such further sum as would make the fortune of another daughter equal to the fortune given to the first; a gift of a life interest in freehold and leasehold estate made to the first is an additional portion of fortune within the covenant. But the gift of furniture is not (*d*). **2536.**

The word "thirds" is not confined to real estate, but is a general expression which may signify the interest of a widow in any property, whether real or personal, of her deceased husband (*e*). **2537.**

(*a*) *Earl of Rosse v. Wainman*, 14 M. & W. 859; 2 Exch. 800; *Darvill v. Roper*, 3 Drewry 296, 299—301; *Bell v. Wilson*, L. R. 1 Ch. Ap. 303; *Heat v. Gill*, L. R. 7 Ch. Ap. 699.

(*b*) *Heat v. Gill*, L. R. 7 Ch. Ap. 699, 712.

(*c*) Sugd. V. & P. 14th ed. 257; Chit. Cont. 8th ed. 658; Byles on Bills, 8th ed. 188.

(*d*) *Eardley v. Owen*, 10 Beav. 572.

(*e*) *Thompson v. Watts*, 2 Johns. & Hem. 291.

## SECTION X.

*Of Estoppel.*

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CH. 7, s. 10.

Definition.

Estoppel or conclusion is the being stopped or debarred by a statement or an act from alleging anything contrary to that which such statement expresses or such act imports. **2538.**

Different  
kinds.

Estoppels are of three kinds : by matter of record, such as a fine or recovery ; by deed ; or by some act, such as entry, payment or acceptance of rent, etc. (a). **2539.**

A person claiming an estate for life under a will which is inoperative for want of any interest in the testator, is estopped from disputing the title of those who claim in remainder under the same will. And the like estoppel also exists in favour of those who claim under the latter, and against those who claim under the former (b). **2540.**

How estop-  
pels are  
regarded.

Estoppels are favoured where they operate in support of truth, but they are deemed odious, where they operate as legal traps (c). **2541.**

Reciprocity  
necessary.

An estoppel must in general be reciprocal, that is, it ought to bind both parties (d). **2542.**

Affirmation  
precise and  
certain.

Hence, to create an estoppel, there must be an affirmation, precise and certain to every intent, and not taken by way of argument or inference (e). **2543.**

A general  
recital does  
not, but a  
particular  
recital does,  
work an  
estoppel.

A general recital does not work an estoppel. But if an indenture contains a recital of a particular circumstance as a fact, it works an estoppel or conclusion, that is, it stops and concludes the party or parties whose averment it is from averring anything contrary to such recital in any legal proceedings founded on that

(a) Co. Litt. 352 a ; *Duke v. Ashby*, 7 Hurl. & Norm. 600. Evid. 3rd ed. 654—5.

(b) *Board v. Board*, L. R. 9 Q. B. 48. T. 276, n.

(e) Co. Litt. 352 b.

(c) Co. Litt. 365 b ; Best on

deed (a). But in some cases of mistake, relief is given in equity (b). **2544.**

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Where a recital is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But when it is intended to be the statement of one party only, the estoppel is confined to that party. And the intention is to be gathered by construing the instrument. Thus, where in an indenture of transfer of securities from one lender to another, there was a recital that money advanced by the transferror was owing, and a covenant to the same effect, this was held to be the statement of the transferror alone; so that the transferee was not precluded by it from suing on the covenant, on the ground that no money was owing to the transferror (c). **2545.**

Where es-  
toppel by  
recital is  
upon one  
person only.

Where a distinct statement of a particular fact is made in a recital, a party to the instrument is not estopped from disputing that fact in an action by another party to the same instrument, not founded on that instrument, and wholly collateral to it; for such recital, though evidence of the fact, is not conclusive evidence; so that evidence of the circumstances under which such statement was made, is receivable, to show that the admission was inconsiderately made, and is not entitled to weight as a proof of the fact which it is used to establish (d). **2546.**

Estoppel  
confined to  
proceedings  
on the deed.

Privies in blood, as the heir, except an heir in tail; privies in estate, as the feoffee, lessee, etc.; privies in law, as the lord by escheat, tenant by the curtesy, tenant in

Who are  
bound by,  
and may  
take advan-  
tage of, es-  
toppels

(a) 1 Pres. Shep. T. 53; 4 Cruise T. 32, c. 20, § 24; Burton, § 331; Co. Litt. 352 b; *Carpenter v. Buller*, 8 M. & W. 209; *Carter v. Carter*, 3 K. & J. 617, 644—6; *Gwyn v. Neath Canal Co.*, L. R. 3 Ex. 209; *Ex parte Morgan, In re Simpson*, L. R. 2 Ch. D. (Ap.) 72.

(b) Manual of Eq. 13th ed. tit. 1, c. 2.

(c) *Stroughill v. Buck*, 14 Ad. & E. (N. S.) 781.

(d) *Carpenter v. Buller*, 8 M. & W. 209; *Carter v. Carter*, 3 K. & J. 617, 644—6.

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dower, and others who come in by act of law or "in the post," shall be bound and take advantage of estoppels by deed (a). But regularly, a stranger, or a femme covert, or an infant, shall not take advantage of an estoppel, for want of mutuality (b). And where a person sues, not in his own right, but in right of another, he must be deemed a stranger, so as not to be bound by estoppel by a deed executed by him in his own right (c). Strangers, however, shall both take the benefit of and be concluded by a record relating to the disability or legitimation of a person (d). **2547.**

Interest  
created by  
estoppel  
under an  
indenture.

Where by deed indented a man directly and unequivocally recites that he is owner of an estate, and affects to convey it for valuable consideration, when in reality he has only an interest under a limitation in favour of a person not yet ascertained, or a mere hope or chance of succession as heir apparent, or no interest whatever, there, if by any means he afterwards acquires an interest in the estate, he is estopped, in any legal proceedings founded on that deed, from saying, as against the other party to the indenture, contrary to his averment in that recital, that he had not such interest at the time of its execution (e). But the covenants for title in a mortgage of a freehold estate, that the mortgagor has full power to grant and convey, etc., do not create any estoppel, that the mortgagor has the legal estate, but only create a liability to pay if he has not the legal estate (f).

(a) Co. Litt. 352 a; 4 Cruise T. 32, c. 19, § 60; 1 Pres. Shep. T. 53; *Board v. Board*, L. R. 9 Q. B. 48.

(b) Co. Litt. 352 a; 9 Jarm. & Byth. by Sweet, 81; 2 Pres. Shep. T. 276, n.; 4 Cruise T. 32, c. 19, § 60.

(c) *Metters v. Brown*, 1 Hurl. & Colt. 686.

(d) Best on Evid. 3rd ed. 655.

(e) 2 Pres. Shep. T. 328; 4 Jarm.

& Byth. by Sweet, 125—128; 9 Jarm. & Byth. by Sweet, 81, 82; *Bensley v. Burdon*, 2 S. & S. 519, affirmed on appeal, 8 L. J. 85. But see *Stackpoole v. Stackpoole*, 4 Dru. & War. 347; and *Lloyd v. Lloyd*, 4 Dru. & War. 354.

(f) *General Finance, etc. Co. v. Liberator, etc. Building Society*, L. R. 10 Ch. D. 15.



If a lease is made by indenture by a person who at the time had no interest in the property, but that fact does not appear on the face of the deed, it is a good demise by way of estoppel; and a reversion in the lessor by estoppel is thereby created, which may be conveyed to another person. And if a lease for a longer term is afterwards made to the lessor by the real owner, the first lease thereupon becomes a lease in interest; the estoppel created by the first lease being fed by the interest created by the second lease of the real owner (*a*). But if a deed operates to any extent actually to pass an interest from the lessor, it shall not afterwards operate by estoppel, though the interest purported to be granted be really greater than the lessor at that time had power to grant: as if A., lessee for the life of B., makes a lease for years by indenture, and afterwards purchases the reversion in fee, and then B. dies, A. shall avoid his own lease, though the years expressed in the lease be not expired (*b*). **2548.**

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A deed poll cannot create an estoppel in point of estate. But if a deed poll of A. recites that A. by bond did, etc., A. cannot say that there is not any such bond (*c*). **2549.**

Estoppel by  
deed poll.

The doctrine of estoppel does not prevent a deed from being impeachable for fraud or illegality (*d*). **2550.**

Fraud or  
illegality.

## SECTION XI.

### *Of C cancelling Deeds.*

To cancel a deed, it may either be delivered up for that purpose to the party who is bound by it, and cancelled by him accordingly, by tearing off the seals or otherwise defacing it, or the person who has the deed may cancel it by agreement with the other party (*e*). If

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Ch. 7, s. 11.

Mode of  
cancelling.

(*a*) *Sturgeon v. Wingfield*, 15 M. & W. 224; Co. Litt. 47 b; 2 Pres. Shep. T. 53, 320, 321; 4 Jarm. &

Byth. by Sweet, 122, 123, 126; Burton, § 850.

Co. Litt. 45 a; Burton, § 850; 1 Pres. Shep. T. 53.

(*c*) 1 Pres. Shep. T. 53.

(*d*) Broom's Com. 2nd ed. 283.

(*e*) 2 Bl. Com. 308; 4 Cruise T.

(*b*) 4 Cruise T. 32, c. 19, § 58; 32, c. 26, § 18.

Pt. III. T. 12,  
Ch. 7, s. 11.

the seal, etc., were broken or destroyed by accident, or by a stranger, or by the obligor, the deed would remain in force, on proof that it was sealed and delivered, and accidentally or wrongfully cancelled. To destroy the deed, there must be a cancellation *eo animo* (a). 2551.

Effect of  
cancelling.

So far as regards the operation of an assurance in vesting an estate or interest in real or personal property, as distinguished from those operations of the assurance which are merely accessory or incidental, it is immaterial, except as to the evidence of original validity, whether the deeds continue in force or not: for, their whole effect as regards this purpose is instantaneous, and the estate which has once passed cannot be recalled (b). And hence an estate or interest in real or personal property which has once vested by a deed, cannot be divested by cancelling the deed; because, once vested, it exists, independently of the deed, in the person in whose favour it was created or to whom it was transferred (c). So that any freehold estate or a money fund once absolutely vested by a settlement cannot be divested by merely cancelling the deed creating or transferring it; nor can a lease for years be surrendered by cancelling the indenture of lease; nor can a lease for years assigned be re-vested in the assignor by cancelling the assignment. To accomplish the purposes intended, the freehold estate must be conveyed, the benefit of the settlement must be released, the lease for years must be surrendered, and the leasehold estate must be assigned. But a mere contract or obligation, of which the deed is the essence, may be extinguished by destroying the deed with that intent (d). 2552.

(a) 1 Pres. Shep. T. 69; Burton, § 443.

(b) Burton, § 444; 2 Jarm. & Byth. by Sweet, 285; Co. Litt. 225 b, n. (1).

(c) 2 Jarm. & Byth. by Sweet,

285; 4 Cruise T. 32, c. 26, § 18—20; *Lord Ward v. Lumley*, 5 Hurl. & Norm. 87. But see Co. Litt. 308 b, as to incorporeal hereditaments.

(d) 2 Jarm. and Byth. by Sweet,

285.

## TITLE XIII.

### OF ALIENATION BY MATTER OF RECORD (*a*).

ASSURANCES by matter of record are such as do not PT. III.T.13. entirely depend on the act or consent of the parties themselves, but the sanction of a Court of record is called in to substantiate, preserve, and be a perpetual testimony of the transfer of property, or of its establishment, when already transferred. Of this nature are,

- I. Private Acts of Parliament.
- II. Royal Grants.
- III. Fines.
- IV. Common recoveries. **2553.**

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### CHAPTER I.

#### OF PRIVATE ACTS AND ROYAL GRANTS.

##### I. *Of Private Acts.*

PRIVATE ACTS are frequently resorted to as a mode of PT. III.T.13, CH. 1. assurance, in cases where the object of parties can be effected in no other way: as to unfetter an estate, to Where they are used. give its tenant reasonable powers, or to assure it to a purchaser against the remote or latent claims of persons under legal disability (*a*). **2554.**

Acts of this kind are not passed without great care to avoid any injustice. Nothing is done without the consent expressly given, of all parties in being and capable of Care taken to avoid injustice and abuse of this mode of assurance.

(*a*) See 2 Bl. Com. 344—5.

PT. III. T. 13,  
CH. 1.

consent, who have the remotest interest in the matter ;  
— unless such consent appears to be perversely and without any reason withheld. And an equivalent in money or other property is usually settled upon infants, or persons not in esse, or not of capacity to act for themselves, who are to be concluded by the Act. And a general saving is constantly added, at the close of the Act, of the right and interest of all persons whatsoever, except those whose consent is so given or purchased, and who are therein particularly named ; though even if such saving is omitted, the Act will bind none but the parties (a). **2555.**

Light in  
which private Acts are  
regarded.

Construction of private Acts.

A law thus made, though it binds all parties to the Acts, is yet looked upon rather as a private conveyance, than as the solemn act of the legislature (b). Hence private Acts are construed in the same manner as conveyances that derive their effect from the common law (c). **2556.**

Title, marginal notes,  
and punctuation.

The title, marginal notes, and punctuation of an Act of Parliament form no part of it, and on principle it appears doubtful how far even the title ought to be taken into consideration in the construction of it (d). **2557.**

Repugnancy.

If two sections of an Act are absolutely repugnant, the last shall prevail (e). **2558.**

Time of

Before the stat. 33 Geo. 3, c. 13, an Act took effect from

(a) 2 Bl. Com. 345 ; 5 Cruise T. 33, § 29 ; Burton, § 482—3.

(b) 2 Bl. Com. 346.

(c) 5 Cruise T. 33, § 39.

(d) *Att.-Gen. v. Lord Weymouth*, Ambl. 22 ; *Hunter v. Nockolds*, 1 Mac. & G. 651 ; *Willes. J.*, in *Claydon v. Green*, L. R. 3 C. P. 522. In *Re Venour's Settled Estates*, L. R. 2 Ch. D. 525, *Jessel*, M. R., expressed an opinion that the marginal notes form part of the Act. They do in one sense. that they are attached to it. But they are often a most misleading

addition to the Act, and are either not the work of the draftsman, or allowed to remain without any regard to subsequent alterations. It is disgraceful that such appendages should exist. That any use should be made of them for interpreting the Act would be highly objectionable, until they are properly framed and revised. But see *Sutton v. Sutton*, L. R. 22 Ch. D. (Ap.) 513, where *Jessel*, M. R., reversed this dictum.

(e) *Keating*, J., in *Wood v. Riley*, L. R. 3 C. P. 27.

the first day of the session in which it was passed (a). Pt. III. T. 13, Ch. 1.  
 But, by that statute, private as well as public Acts commence their operation (unless it be otherwise provided) commence-ment.  
 from the time of the Royal assent being given (b). **2559.**

An Act has no retrospective operation, unless an intention that it should so operate is clear from the language used (c). **2560.** Retrospective operation.

Acts of Parliament of a local or private nature, if contrary to reason, or grounded on a false statement or recital in the preamble, or obtained by fraudulent suggestions have been held to be void (d). **2561.** When void.

## II. *Of Royal Grants.*

These are contained in charters or letters patent (*literæ patentés*), that is, open letters (e). **2562.**

1. A grant made by the Sovereign, at the suit of the grantee, is taken most beneficially for the Crown, and against the party: whereas the grant of a subject is construed most strongly against the grantor. Wherefore, it is usual to insert in the royal grants, that they are made not at the suit of the grantee, but "*ex speciali gratia, certa scientia, et mero motu reginæ*"; and then they have a more liberal construction. 2. A subject's grant shall be construed to include many things besides what are expressed, if necessary for the operation of the grant. But a royal grant shall only enure to that which is precisely expressed in the grant. 3. When it appears, from the face of the grant, that the Sovereign is mistaken, or deceived, either in matter of fact or matter of law, as

(a) 1 Jarm. & Byth. by Sweet, 94.

(b) Burton, § 485.

(c) *Ellis v. McCormick*, L. R. 4 Q. B. 274.

(d) Burton, § 482 ; 2 Bl. Com. 346.

(e) 2 Bl. Com. 346 ; Burton, §

486. As to the course of proceeding with respect to the making out of a grant by letters patent, see 1 Steph. Com. 596. And as to the subject-matter of royal grants, see 1 Steph. Com. 598—9, and Stamp's Index to the Statute Law, tit. "Crown Lands," etc.

PT. III. T. 13,  
CH. 1. in case of false suggestion, misinformation, or misrecital of former grants ; or if his own title to the thing granted is different from what he supposes ; or if the grant is informal ; or if he grants an estate contrary to the rules of law ; in any of these cases the grant is absolutely void (*a*). And to prevent the Sovereign from being deceived with regard to the value of the estate granted, it is particularly provided by the stat. 1 Hen. 4, c. 6, that no grant of his shall be good, unless, in the grantee's petition for them, express mention be made of the real value of the lands (*b*). **2563.**

(*a*) 2 Bl. Com. 347; see *Att.-Gen. v. Exchequer Hospital*, 17 Beav. 386—7.  
(*b*) 2 Bl. Com. 348.

## CHAPTER II.

## OF FINES.

## SECTION I.

*Of Fines generally.*

A FINE (finis) was an amicable composition or agreement and termination of a suit, either actual or fictitious, whereby the lands which formed the subject of such suit were acknowledged to be, and thereby became, the property of one of the parties to whom the fine was levied. In its origin it was founded on an actual suit, commenced at law for recovery of the possession of land or other hereditaments; and the possession thus gained by such composition was found to be so sure and effectual, that fictitious actions were commenced, for the sake of obtaining the same security (a). **2564.**

Pr. III. T. 13,  
Ch. 2, s. 1.

Definition of  
a fine.

The mode of levying a fine was this:—1. The party to whom the land was to be conveyed or assured commenced an action against the other, generally an action of covenant, by suing out a writ of præcipe, called a writ of covenant, the foundation of which was a supposed agreement or covenant that the one should convey the lands to the other, on the breach of which agreement the action was brought. 2. A licentia concordandi, or leave to compromise the suit, was then obtained from the Court. 3. Next came the concord or agreement itself, which was usually an acknowledgment from the deforciant, or those who kept the other out of possession, that the lands in

Mode of  
levying a  
fine.

(a) 2 Bl. Com. 349.

Pr. III. T. 18,  
Ch. 2, s. 1.

question were the right of the complainant. And from this acknowledgment or recognition of right, the party levying the fine was called the cognisor, and he to whom it was levied the cognisee (*a*). 4. The next part was the note of the fine, which was only an abstract of the writ of covenant and the concord, naming the parties, the parcels of land, and the agreement. This was to be enrolled of record in the proper office, by direction of the stat. 5 Hen. 4, c. 14. 5. The fifth part was the foot of the fine or conclusion of it, which includes the whole matter, reciting the parties, day, year, and place, and before whom it was acknowledged or levied. Of this there were indentures made or engrossed at the chirographer's office, and delivered to the cognisor and cognisee (*b*). **2565.**

Additional  
forms re-  
quired by  
statute.

By the above proceedings a fine was complete at the common law. But, by several statutes, still more forms were superadded. It is only necessary to mention that by the statutes 5 Hen. 4, c. 14, and 23 Eliz. c. 3, all the proceedings on fines were to be enrolled of record in the Court of Common Pleas. And by the statutes 1 Rich. 3, c. 7, 4 Hen. 7, c. 24, and 31 Eliz. c. 2, fines were to be openly read and proclaimed in Court, once in the term in which they were made, and once in each of the three succeeding terms; and these proclamations were to be indorsed on the record (*c*). **2566.**

Fines are of  
four kinds.

Fines are of four kinds: 1. A fine sur cognizance de droit come ceo que il ad de son done, or a fine upon acknowledgment of the right of the cognisee, as that which he hath of the gift of the cognisor. This is the best and most usual kind of fine. It acknowledged a former gift or feoffment in possession to have been made by him to the plaintiff, and thereby it virtually conveyed an estate,

(*a*) 2 Bl. Com. 350.

(*c*) 2 Bl. Com. 352.

(*b*) 2 Bl. Com. 350—1.



either of inheritance or at least of an absolute freehold, and gave the cognisee a seisin in law without any actual livery, and is therefore called a fine executed, whereas the others are but executory. 2. A fine sur cognizance de droit tantum, or upon acknowledgment of the right merely, not with the circumstance of a preceding gift. This was commonly used to pass a reversionary interest which was in the cognisor. For of such reversions there could be no feoffment or donation with livery supposed, as the possession, during the particular estate, belonged to a third person. 3. A fine sur concessit is where the cognisor granted to the cognisee an estate de novo, usually for life or years, by way of supposed composition. And in this case there might be a reservation of a rent or the like; for it operated as a new grant. 4. A fine sur done grant et render is a double fine, comprehending the fine sur cognizance de droit come ceo, etc., and the fine sur concessit; the cognisee, after the right is acknowledged to be in him, granting it back again, or rendering to the cognisor or to a stranger some other estate in the premises (a). **2567.**

Pr. III. T. 13,  
Ch. 2, s. 1.

By the stat. 3 & 4 Will. 4, c. 74, s. 2, fines are abolished. **2568.**

Abolition of  
fines.

By s. 5 of the same statute, the fines or common recoveries which at any time before the passing of the Act may have been levied or suffered in certain unlawful or unauthorised courts shall not be invalid in consequence of their having been levied or suffered therein. **2569.**

Fine or re-  
covery in  
unautho-  
rised Court.

By s. 7 of the same statute, errors in fines are rectified in certain cases without amendment. **2570.**

Rectifica-  
tion of  
errors.

By the stat. 11 & 12 Vict. c. 70, s. 1, after reciting that notwithstanding all fines levied in the Court of Common Pleas at Westminster were levied with proclamations, yet unnecessary trouble and expense were occasionally

Evidence of  
proclama-  
tions.

(a) 2 Bl. Com. 352—3.

PT. III. T. 13,  
CH. 2, S. 1.

incurred by parties being required to procure evidence of such proclamations having been in fact made, it is enacted that "all fines heretofore levied in the said Court of Common Pleas, shall be conclusively deemed to have been levied with proclamations." But by s. 3, it is provided, that "this Act shall not extend to any fine heretofore levied of or concerning any lands, tenements, or hereditaments which at the time of the passing of this Act shall be actually possessed or enjoyed by any person or persons under a title adverse to or inconsistent with the operation of such fine if levied with proclamations, but in all such cases it shall be necessary for all parties alleging that such fine was levied with proclamations to prove such allegation in the same manner as if this Act had not been made." **2571.**

Neglects  
and omis-  
sions as to  
fines in  
Wales and  
Cheshire.

By the stat. 5 Vict. sess. 2, c. 32, intituled "An Act for better recording Fines and Recoveries in Wales and Cheshire," fines in the abolished Courts of those districts are made good, notwithstanding certain neglects or omissions in regard to them. **2572.**

## SECTION II.

### *Of the Operation of Fines.*

PT. III. T. 13,  
CH. 2, S. 2.

Importance  
of the sub-  
ject.

It is scarcely necessary to observe to the legal reader, or, at least, to the practitioner, that, although fines and recoveries were abolished many years ago, an accurate knowledge of the operation of those assurances will still be of the greatest practical importance, since the Act for their abolition does not set aside the force and effect of those levied or suffered before the year 1834, thousands of which will therefore continue most materially to affect the title to real property in this country. Such being the case, an attempt will here be made to give a succinct, yet accurate, well-defined, and per-

spicuous view of that subject, which, in our standard text-books, occupies a considerable space, and is involved in much intricacy, obscurity, and real or apparent discrepancy. **2573.**

Pt. III.T.13,  
Ch. 2, s. 2.

A fine was completed when the concord was duly acknowledged (*a*), and it began to operate from the return-day of the writ of covenant on which it was levied, which was usually the first day of the term in which it was recorded (*b*). **2574.**

When a fine was completed and began to operate.

A fine sur cognizance de droit come ceo, etc., without any qualification in the concord or elsewhere, passed a fee simple, without the word "heirs" (*c*). But it might be so qualified by express words in the concord, or even in some other deed connected with it, as to pass an estate in tail or for life (*d*). **2575.**

What estate it passed.

Fines of this sort vary in their efficacy, according to the ceremonies observed in completing them, the legal character of the parties, and the conduct of the other persons whose rights were affected by them. And it would seem that they might operate in the following ways:— **2576.**

Its efficacy varies with circumstances.

I. By way of conclusion or estoppel.

Modes of operation.

II. As an ordinary conveyance, by way of grant, release, surrender, or confirmation.

III. As an extinguishment of a right of entry or action.

IV. As an extinguishment of a power appendant or in gross.

V. As a revocation of a devise.

VI. As a conveyance of the estate of a married woman, or as an extinguishment of her dower.

VII. As a bar to the heirs in tail of the cognizor.

VIII. As an instantaneous bar of contingent remainders.

(*a*) 5 Cru. Dig. tit. 35, c. 2, § 71.

(*c*) 5 Cru. Dig. tit. 35, c. 3, § 13;

(*b*) 5 Cru. Dig. tit. 35, c. 2, §

1 Prest. Conv. 202.

(*d*) Id. § 14; *infra*, par. 2583.

Pr. III.T.13,  
Ch. 2, s. 2.

IX. As a simple divestment, without causing any bar in case of non-claim.

X. As a forfeiture.

XI. Both as a divestment, and as a bar in case of non-claim.

XII. As a discontinuance, without causing any bar in case of non-claim.

XIII. Both as a discontinuance, and as a bar in case of non-claim.

XIV. As a bar in case of non-claim, without causing a divestment or discontinuance. 2577.

### I. *Conclusion or Estoppel.*

A fine estops  
the parties,

and their  
privies in  
blood and  
estate,

and their  
vendees, or  
devisees, etc.

Unless levied by a married woman alone, as such, a fine, whether it were levied with proclamations according to the statute or not, operates by estoppel, that is, it estops or prevents the parties, whether cognizors or cognizees, and their privies in blood and estate, so far as they claim the same interest by the same title, from averring or proving anything contrary to the fine. And privies in blood and estate include those persons who, in order to make title to the estate, must claim immediately through or under the parties themselves, as heirs general to them, and also those who claim derivatively through or under such persons as heirs general to them. A fine likewise operates by estoppel as against vendees or devisees of the parties to it, or of their privies in blood and estate, claiming under instruments taking effect subsequently to the fine, and those claiming through or under such vendees or devisees, in privity of blood and estate, or as derivative vendees or devisees (a). 2578.

Illustration

To illustrate what is meant by privity of blood and

(a) See 5 Cru. Dig. c. 12, § 6; 21, 30; Prest. Conv. 260; Burt. 2 Bl. Com. 355; Pres. Shep. T. 3, Comp. § 79, n. 80, 83.

estate, in reference to the doctrine of estoppel, we may observe, that, if the father disseised the grandfather of lands of which the latter was seised in fee simple, and then levied a fine of the land, and then the grandfather died and afterwards the father died, the grandson was barred by the fine; but, if the father had not survived the grandfather, the grandson would not have been bound (*a*), because the grandson would then have claimed as heir to the grandfather, and not as heir to the father. **2579.**

Pt. III. T. 13,  
Ch. 2, s. 2.

of privity in  
blood and  
estate.

A fine had the operation above mentioned even when none of the parties had any interest in the lands at the time of levying the fine, and where it was consequently void as to strangers (*b*). **2580.**

Fine by  
parties  
having no  
interest.

Even if a femme covert levied a fine of her estate, but as a femme sole, the fine, unless avoided by the husband, bound her and her heirs, because she and they were estopped from claiming anything in the lands, and could not be admitted to aver that she was a married woman, that being contrary to the record. But her husband might enter and defeat such fine, either during the coverture to restore himself to the freehold, which he held in right of his wife, or after her death to restore himself to his tenancy by the curtesy (*c*). But if she levied the fine alone, as a married woman, it was void, or at least might be avoided, even by the wife or her heirs (*d*). **2581.**

Fine by a  
married  
woman.

The issue in tail cannot be bound by estoppel, so as to prevent them from asserting their right to the estate, because they do not claim from their immediate ancestor, but per formam doni (*e*). It has been decided, however, that, where the issue in tail levied a fine,

Estoppel as  
against the  
issue in tail.

(*a*) Pres. Shep. T. 21.

Pres. Shep. T. 7.

(*b*) 5 Cru. Dig. tit. 35, c. 5, § 36,  
and c. 12, § 6, 7; Pres. Shep. T.  
6, 14; Burt. Comp. § 80, 83.

(*d*) 5 Cru. Dig. c. 5, § 13; 1 Prest.  
Conv. 255.

(*c*) 5 Cru. Dig. tit. 35, c. 5, § 11;

(*e*) 5 Cru. Dig. tit. 36, c. 2, § 57;  
Pres. Shep. T. 14.

Pr. III. T. 13,  
Ch. 2, s. 2.

without proclamations, in his ancestor's lifetime, the fine so far operated by estoppel, as against himself, and those claiming through him as heirs in tail, as that, by force of the statute 27 Edw. 1, c. 1 (*De finibus levatis*), it prevented them from averring *quod partes finis nihil habuerunt*; and that as soon as the issue in tail succeeded to the estate, the interest which then existed fed the estoppel (a). **2582.**

Operation of  
a fine may  
be quali-  
fied.

The operation of a fine, whether it enures by way of estoppel only or not, may be qualified by another assurance so connected with it that both form parts of one and the same transaction; so that the fine, though of itself acknowledging the existence of an absolute fee simple in the cognizee, may be rendered subservient to the particular uses of such assurance, and to the intention of the parties (b). Hence, if A. enfeoffed B. of certain land in fee, rendering rent, with a condition of re-entry for non-payment, and, by indenture covenanted to levy a fine of the same land to the uses and conditions in the deed of feoffment, the rent and condition were not extinguished by the fine, but remained (c). **2583.**

## II. *An Ordinary Conveyance.*

A fine, whether with or without proclamations, might be employed to effect the same purposes as those which are accomplished under the same or other circumstances by an ordinary conveyance, by way of grant, release; surrender, or confirmation. **2584.**

Fine be-  
tween joint  
tenants  
operating as  
a release.

Thus, a fine levied by one joint tenant to his companion operated as a release; for, each joint tenant being seised *per my et per tout* before the fine, and

(a) *Doe d. Thomas v. Jones*, 1 VI. ; and see *Tyrrell v. Marsh*, 3 Twyr. 506 ; see *infra*, XII. Bing. 31 ; S. C., 10 Moore 305.

(b) See Co. Litt. 342 b, n. (1), (c) Pres. Shep. T. 35.

the cognizor being estopped by the fine from claiming any estate in the land, the seisin per tout, which the other had before the fine, became freed from the participation therein of the cognizor, so that the other became thenceforth seised per tout simply, just as he would have been had the cognizor died before him. And if one coparcener in tail levied a fine to another coparcener, it operated as a grant. And if a tenant in tail made a bargain and sale in fee, and then levied a fine to the bargainee, the fine operated as a confirmation of the estate which passed by the bargain and sale. So, if a tenant in tail made a lease not warranted by the statute, confessed a judgment, made a mortgage, or incumbered his estate in any other manner, and afterwards levied a fine with proclamation, it operated as a confirmation of all his prior charges and incumbrances (a), because, by barring the estate tail, it deprived the issue in tail of that right to avoid the estate passed by the bargain and sale, or the charges and incumbrances, which the issue would otherwise have had. **2585.**

Pr. III.T.13,  
Ch. 2, s. 2.

Fine between coparceners operating as a grant.  
Fine by a tenant in tail, operating as a confirmation.

A fine which could only operate by estoppel at first, might, in some cases, at length take effect as a conveyance. Thus, if a fine was levied of an executory interest, whether contingent or not, or even of a mere expectancy of an estate in fee, it operated at first by estoppel only; it did not actually transfer the interest or expectancy; nor had it any other present effect than that of indirectly binding the interest or expectancy, so as to preserve it for the cognizee, by estopping or preventing the cognizor from contradicting what he had done, by any attempt to dispose of or affect it in any other way. But as soon as the interest or expectancy became a vested interest in the cognizor, the fine operated as a con-

Fine operating first by estoppel and afterwards as a conveyance; as where it was levied of executory interest or an expectancy.

(a) See 5 Cru. Dig. tit. 35, c. 9, Co. Litt. 200 b, n. (1); Pres. Shep. § 39, 40 et seq., c. 12, § 1—4; T. 6, 287.

PT. III. T. 18,  
CH. 2, s. 2.

veyance to the cognizee, in the same manner as it would have operated in the first instance, if the interest or expectancy had been a vested interest, and, therefore, capable of being transferred (*a*). In these cases, then, the estoppel virtually and finally amounted to, though it was not, in the first instance, an actual transfer of the interest or expectancy to the cognizee. **2586.**

### III. *An Extinguishment of a Right of Entry or Action.*

A person who had a right of entry or action could not transfer it; and hence, if he levied a fine to a stranger, it did not pass to the cognizee, but the fine enured as a release by way of extinguishment to the benefit of the person to whom the right might have been released; because the cognizor was estopped by the fine from claiming the land, and yet the fine failed to transfer the right to the cognizee; so that the right became extinguished to the advantage of the person against whom, but for the fine, it might have been asserted. **2587.**

Fine by a  
disseisee to  
a third  
person.

Thus, where a fine was levied by a disseisee to a third person, it could be of no benefit whatever to the latter, but virtually operated as an extinguishment of the right of the disseisee, so as to confirm the title of the disseisor; for the disseisee could not afterwards enter on the disseisor, because he was estopped from saying that the land belonged to him; nor could the cognizee enter, a mere right of entry not being transferable; and the right of entry being thus unavailable, both as to the disseisee and cognizor, and as to the cognizee, it was virtually extinguished for the benefit of the disseisor (*b*). **2588.**

(*a*) See Burt. Comp. § 80, 82; Smith's Executory Interests annexed to Fearn, § 754—756; *Davies v. Bush*, M'Clel. & You. 88.

(*b*) See Pres. Shep. T. 35; 1 Prest. Conv. 208, 209; Burt. Comp. § 75, 80.



IV. *An Extinguishment of a Power appendant or in gross.*

A fine levied by a donee of a power appendant or in gross might operate as an extinguishment of the power, where the operation of the fine was not qualified by some other assurance connected with the fine (a). **2589.**

But where it appears, from some other assurance connected with the fine, that it was not intended to have the effect of extinguishing the power, it will not have that effect. Thus, where it appears, from a deed leading the uses of a fine, that the fine was levied by husband and wife expressly for the purpose of corroborating a term and securing the regular payment of a life annuity, the fine did not extinguish a power of consenting to a sale of the estate reserved to the wife, so as to prevent an exercise of a power of sale by the trustees, to whom such power of sale, with such consent, was given; because the fine was only intended to effect the principal purpose specified, and not to destroy the power (b). **2590.**

V. *A Revocation of a Devise.*

If a person levied a fine of lands which he had devised previously to the fine, and also previously to any other assurance connected with the fine and forming part of the same transaction, the fine operated as a revocation of the devise. This was the case even though he took back the same estate; as, where he was seised in fee, and made no declaration of the uses of the fine (c). **2591.**

(a) See Co. Litt. 342 b, n. (1), S. C. 10 Moore, 305.

IV.—VI. 3; *Bickley v. Guest*, 1 Russ. & My. 440.

(c) See 6 Cru. Dig. tit. 38, c. 6, § 72—78.

(b) *Tyrrell v. Marsh*, 3 Bing. 31;

Pr. III. T. 13,  
Ch. 2, s. 2.

## VI. *A Conveyance of a Married Woman's Estate, or an Extinguishment of Dower.*

Fine by a married woman jointly with her husband.

If a married woman joined in a fine of any kind, it would operate as a conveyance, either absolutely or by way of mortgage, of her estate, of which her husband was seised in her right, or of her jointure, or as an instantaneous extinguishment of her dower, or of any charge created in her favour on her husband's lands; because a married woman might always be bound by a judgment in a suit, and a fine was an accommodation of a suit, although, indeed, of a fictitious one; and because the wife was privately examined as to her voluntary consent (*a*). 2592.

Fine by the husband alone, or by both without a declaration of uses.

But a fine by the husband alone did not bar his wife of dower; nor did a fine by both of them, without any declaration of uses; because the use resulted to the husband, and a new right to dower accrued (*b*). 2593.

## VII. *A Bar to the Heirs in tail of the Cognizor.*

A fine was a bar to lineal heirs in tail, and to collateral relations, etc.

By force of the stat. 4 Hen. 7, c. 24, explained by the stat. 32 Hen. 8, c. 36, a fine, if levied *with* proclamations, and by a legal tenant in tail in possession, remainder, or reversion, operated as an instantaneous bar to all the lineal heirs in tail of the cognizor, and to all his collateral relations who were privy to him in blood and estate, that is, to all his collateral kindred, who, in order to take under the entail, must have claimed as collateral heirs to him (the cognizor) or his issue; and the fine is also a bar to all who claim under him or them in other ways. So that, if a tenant in tail had two sons, and the eldest levied a fine in the

Examples.

(*a*) See 5 Cru. Dig. tit. 35, c. 10, par. 510.  
§ 5—22; Co. Litt. 121 a, n. (1); (b) 5 Cru. Dig. tit. 35, c. 10,  
Burt. Comp. § 1369. See supra, § 16—19.

lifetime of the father, and the estate tail descended to him or his issue, the fine barred the younger brother and his issue, as well as his own issue. But if the eldest son died in the lifetime of the father without issue, his fine did not bar his younger brother; because, the estate tail having never become vested in the eldest son or his issue, the second son did not claim as collateral heir to the eldest son or his issue, but as lineal heir of the father (*a*). And if a tenant in tail had three sons, and the second levied a fine with proclamations, the fine never could bar the eldest son or his issue; and it could not bar the youngest son and his issue, unless the estate tail descended to the second son or his issue; so that, if the second son died without issue in the lifetime of the eldest son or his issue, who survived the father, the third son was not barred by the fine, because he claimed as collateral heir to his eldest brother or his issue (*b*). **2594.**

Pr. III. T. 13,  
Ch. 2, s. 2.

It may be expedient to observe to the student, that, if limitations are made in favour of the first and other sons successively in tail, a fine levied by an elder son or his issue would not bar the younger sons or their issue, except in case of non-claim; because, in this case, each son has a distinct entail. **2595.**

A fine had the effect above described, even though levied by the issue in tail in the lifetime of the tenant in tail, or by a tenant in tail during a disseisin of his estate, or by one who had but a contingent interest in tail (*c*), and even though it might be defeated by a stranger (*d*). But a fine, with proclamations, levied by the ancestor subsequently to a fine or other assurance of his issue in tail, was an

Fine by the issue in tail, or by a tenant in tail disseised, or by one who had but a contingent interest in tail, or by the ancestor after one by his issue.

(*a*) See 5 Cru. Dig. tit. 35, c. 9, § 30—33; Pres. Shep. T. 26; 1 Prest. Conv. 218.

(*b*) Pres. Shep. T. 27; 1 Prest. Conv. 309.

(*c*) 5 Cru. Dig. tit. 35, c. 9, § 24; Pres. Shep. T. 3, 6, 13, 14, 21, 24, 26; 1 Prest. Conv. 218, 306.

(*d*) 5 Cru. Dig. tit. 35, c. 9, § 45; 1 Prest. Conv. 297, 298.

Pr.III. T.13,  
Ch. 2, s. 2.

instantaneous bar to the persons claiming under such fine or assurance of the issue in tail, as much as to the issue themselves (a). **2596.**

Lineal  
descendants  
barred in all  
cases.  
Collateral  
kindred, in  
some cases  
only.

It is to be observed, that the lineal descendants of the cognizor, the tenant in tail, are barred in all cases: the collateral kindred in particular cases only. If the cognizor is tenant in tail in possession, the fine is an instantaneous bar to the whole estate tail in possession of which he is seised: it is a bar to all his collateral kindred, so far as they are inheritable in respect of that estate tail, as contradistinguished from any estate tail in remainder or reversion, as well as to his lineal descendants, so far as they are inheritable in respect thereof. But, if the cognizor is not tenant in tail in possession, the fine is not necessarily a bar to the whole estate tail. It is a bar, indeed, to all his lineal descendants, so far as they are inheritable in respect of the estate tail of which he is seised in remainder or reversion, or to which he is the expectant heir, as contradistinguished from any other estate tail in the same property to which they may be inheritable; but it is no bar to those of his collateral kindred (if any), who, in case he himself is not the donee of the entail, are inheritable before him, such as an elder brother; and it is a bar to his collateral kindred inheritable after him in respect of the same estate tail, only in case such estate tail descends, or, but for the fine, would have descended, to him or one of his lineal descendants; or, in other words, only in case of his or one of them becoming heir de facto to the entail (b). **2597.**

Equitable  
estates tail.

A Court of Equity gives the same effect to fines levied of equitable estates tail as that which belongs to fines of legal estates tail (c). **2598.**

Exceptions

To the rule above laid down respecting the operation

(a) See 5 Cru. Dig. tit. 35, c. 9,  
§ 23; Pres. Shep. T. 26.

Conv. 219, 307, 308.

(b) See authorities cited in the  
preceding paragraphs, and 1 Prest.

(c) 5 Cru. Dig. tit. 35, c. 10, § 36;  
Burt. Comp. § 1369, n.

of fines levied by tenants in tail, there are two exceptions. Pr. III.T.13, CH. 2, s. 2.  
 First, a tenant in tail by the gift or provision of the Crown for services is disabled by the stat. 34 & 35 Hen. 8, c. 10, from barring the entail, while a remainder or reversion continues in the Crown (a). And, secondly, a fine by a woman, tenant in tail of lands of the gift of her husband or any of his ancestors, may, in certain cases, be avoided. **2599.**

If a tenant in tail accepted a fine from a stranger, it had no operation; but if he made a grant and render of something that was entailed, it would bar the issue when executed in possession (b). **2600.**

A fine *without* proclamations was no bar either to the issue in tail or to strangers (c). **2601.**

In the case of an entailed rent, a fine levied of the land out of which it issued would bar the entail of the rent; but, properly the fine ought to have been of the rent, and not of the land (d). **2602.**

### VIII. *An instantaneous Bar of Contingent Remainders.*

Where a fine sur cognizance de droit come ceo, etc., was levied by the owner of an estate for life or in tail in possession, and the legal fee simple was not vested in trustees, it occasioned the destruction, or, in other words, it operated as an instantaneous bar of contingent remainders which were expectant on such estate for life or in tail, and were unsupported by any other estate of freehold, unless the operation of the fine were so qualified by the express words of the concord, or by some deed connected with it, such as a deed to lead or declare the uses thereof, as to pass no more than might rightfully pass (e). **2603.**

(a) Co. Litt. 373 a; Pres. Shep. T. 15; 1 Prest. Conv. 221; Burt. Comp. § 707.

(b) 5 Cru. Dig. tit. 35, c. 9, § 41, 42.

(c) Pres. Shep. T. 20.

(d) Pres. Shep. T. 25.

(e) See Smith's Executory Interests, § 766, 767, 770; 5 Cru. Dig. tit. 35, c. 3. § 14; *Davies v. Bush*, M'Clel. & You. 88.

Pr. III.T.13,  
Ch. 2, s. 2.

There is no necessity for the continuance of a preceding particular estate of freehold to preserve contingent remainders, where the legal estate in fee is vested in trustees; for that legal estate will be sufficient to preserve them (a). **2604.**

IX. *A simple Devestment, without a Bar in case of Non-claim.*

Fine without proclamations by a tenant for life in possession.

If the owner of an immediate legal estate for life in actual possession levied a fine of the first kind, *without* proclamations, and the operation of it was not restricted to such an interest as might rightfully pass, it caused a simple devestment, that is, a turning of the estates in remainder or reversion into rights of entry, without causing any bar by or in case of non-claim specifically so called, that is, a non-claim within the stat. 4 Hen. 7, c. 24, as distinguished from a non-claim within the Statute of Limitations. **2605.**

Changes in the law relative to the bar by non-claim.

Originally, indeed, a fine, like a judgment in a real action, was a bar from the moment it was completed. And although this was altered some time at the latter end of the reign of Hen. 3, or the beginning of the reign of Edw. 1, and the fine was no longer an instantaneous bar, yet it was allowed to form a perfect bar, unless claim were made against it within a year and a day; and this was affirmed by the stat. 18 Edw. 1, st. 4, usually called the statute *De Modo levandi Fines*. But by the stat. 34 Edw. 1, c. 16, the bar by non-claim on a fine was entirely removed; and though the stat. 4 Hen. 7, c. 24, afterwards enacted that non-claim within the period therein specified should be a bar, yet that was only in the case of fines proclaimed in the manner required by that statute; and that statute did not repeal the stat. 34 Edw. 1, c. 16, nor prohibit, but expressly permitted, the

(a) Smith's Executory Interests, § 783.

levying of fines as they were theretofore levied. If, Pr. III. T. 13, CH. 2, s. 2. therefore, a fine was not proclaimed in the manner Fine at common law. directed by the stat. 4 Hen. 7, c. 24, or afterwards, in the manner directed by the stat. 31 Eliz. c. 2, by which the stat. 4 Hen. 7, c. 24, was amended, it was subject to the stat. 34 Edw. 1, c. 16, and consequently, was no bar in case of non-claim, specifically so called (a). **2606.**

Still, when levied by the owner of an immediate legal estate for life in actual possession, without being restricted to such an estate as he might lawfully pass, and without the concurrence of the person or persons in remainder or reversion as joint cognizor or cognizors with the tenant for life, it divested the estates in remainder or reversion (b), so as to turn them into rights of entry, and subject them to the consequences attached to non-claim by the Statute of Limitations in case the persons in remainder or reversion failed to enter, and so as to render them incapable of being transferred or devised (c). **2607.**

When there was an estate to A. for years, remainder to B. for life, remainder to C. in tail, etc., a fine levied by B. while A. was in possession would not divest the remainders, because the possession of A. was a continuance of the seisin to C. (d). **2608.**

### X. A Forfeiture.

Such an act, however, of a tenant for life, or his acceptance of a fine come ceo, etc., from a stranger, was Fine by or to a tenant for life in possession, an act of forfeiture of the estate for life, even though he might have a remote estate of inheritance; so that the person in immediate remainder or reversion might, if

(a) See 6 Cru. Dig. tit. 35, cc. 8, § 11, and tit. 13, c. 1, § 15; 6 Cru. 9, and c. 2, § 79, 80; Burt. Comp. Dig. tit. 38, c. 3, § 30; Pres. Shep. T. 14, 32; 1 Prest. Conv. 206, 207, § 77—104.

(b) Pres. Shep. T. 6, 28, 32.

(c) See 5 Cru. Dig. tit. 35, c. 12,

226; Burt. Comp. § 741, 744.

(d) 1 Prest. Conv. 226.

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Ch. 2, s. 2.

he chose, enter immediately, and thereby exclude the cognizor and cognizee, and restore all the estates divested by the fine (a). **2609.**

levied of  
things in  
grant.

A fine come ceo, etc., levied by a tenant for life of things in grant, such as a rent or an advowson, worked a forfeiture, although a fine of things in grant passed no more than what might lawfully pass (b). **2610.**

Fine come  
ceo, etc., by  
a tenant for  
years.  
Fine sur  
concessit.

So, although a fine come ceo, etc., by a tenant for years did not create any bar, yet it worked a forfeiture. But a fine sur concessit would not work a forfeiture, because not only would not that assurance actually pass more than what lawfully might pass, but being as appropriately used for conveying an estate for life or years as for conveying a fee, it did not of itself import an attempt to do an unlawful act (c). **2611.**

Fine by a  
cestui que  
trust for life.

No fine levied by a cestui que trust for life would be allowed in equity to operate as a forfeiture, because it could not affect a remainder (d). **2612.**

Fine by a  
copyholder.

If a copyholder levied a fine of his copyhold, it worked a forfeiture (e). **2613.**

Fine levied  
of a marital  
estate.

The law respecting a fine levied by a woman of an estate which moved from her husband or any of his ancestors, or by a husband alone who was seised in right of his wife, will be found in a subsequent page. **2614.**

## XI. *A Devestment, and a Bar in case of Non-claim.*

Fine with  
proclama-  
tions by a  
tenant for  
life in  
possession.

If the owner of an immediate legal estate for life in actual possession levied a fine *with* proclamations, and the operation of it was not restricted to such an interest

(a) 5 Cru. Dig. tit. 35, c. 12, § 26, 30, 31; Co. Litt. 233 b, n. (1); Pres. Shep. T. 14, 32; 1 Prest. Conv. 201; Burt. Comp. § 741, 744. See supra, par. 1535.

(b) 5 Cru. Dig. tit. 35, c. 12, § 32; Burt. Comp. § 745. See supra,

par. 1535.

(c) 5 Cru. Dig. tit. 35, c. 12, § 33, 34; and c. 3, § 21; *Doc d. Blight v. Pet*, 11 Ad. & Ell. 842.

(d) 5 Cru. Dig. tit. 35, c. 12, § 35.

(e) *Id.* c. 12, § 36.



as might rightfully pass, it operated both as a divestment, and as a bar in case of non-claim, by barring all strangers, that is, all who were neither parties nor privies (with the exceptions noticed *infra*, XIV.), in case they failed to enter within the period allowed by the Statute of Non-Claim, 4 Hen. 7, c. 24 (a). **2615.**

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CH. 2, S. 2.

Three different periods are fixed by the statute in different cases:—

Periods for  
claiming.

1. By the terms or effect of the first saving, strangers, who had a present right of entry or action at the time of the ingrossing of the fine, and were under no disability, and those claiming under them, were allowed five years from the last proclamation. **2616.**

Period  
under the  
first saving  
in favour of  
persons who  
had a pre-  
sent right.

So that if a tenant in tail was disseised, and the disseisor levied a fine with proclamations, the tenant in tail might defeat the fine at any time within five years from the last proclamation, or, if he died within the five years, his issue might avoid it within those five years, but not afterwards (b). **2617.**

2. By the terms or effect of the second saving, strangers who were under no disability, and to whom a present right of entry or action, after the levying of the fine, from any cause or matter prior to the fine, first accrued, and those claiming under them, were allowed five years from the time when such right so accrued. **2618.**

Period  
under the  
second  
saving in  
favour of  
persons to  
whom a  
right ac-  
crued after  
the fine.

So that if a tenant in tail made a conveyance, and the grantee levied a fine, the issue in tail had five years from the death of his father to avoid the fine: because such issue was the first to whom the right accrued after the fine was levied; for his father could not enter against his own conveyance. **2619.**

And where there was a term for years existing at the

Intervening

(a) See 5 Cru. Dig. tit. 35, c. 10; Pres. Shep. T. 3, 6, 14, 23, 28, 32; 1 Prest. Conv. 225, 300; Burt. Comp. § 90. (b) See 5 Cru. Dig. tit. 35, c. 11, § 1—5; Prest. Conv. 236—239; Pres. Shep. T. 22, 23, 30.

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term for  
years.

time when an estate for life or in tail determined, the remainderman or reversioner was allowed five years from the determination of such term. **2620.**

Term the  
ownership  
of which was  
vacant.

If the ownership of a term was vacant for want of letters of administration of the effects of the last owner at the time when the last proclamation was made, or when the right would have accrued to the owner, if there had been one in existence, non-claim did not begin to run till the grant of letters of administration. **2621.**

Successive  
remainders.

The owner of each successive remainder was allowed five years from the determination of all the particular estates anterior to his remainder. But if he, or any other stranger to whom a title first accrued after the fine, not being under disability at the time of the accruer of his right, did not pursue it within the five years those claiming under him were barred, as well as himself. **2622.**

Fine by a  
husband.

If a man levied a fine of land whereof his wife was dowable, she was thereby barred of her dower, unless she claimed within five years from her husband's death. **2623.**

Distinct  
rights.

A stranger, who had distinct rights accruing at different times, was allowed five years after the accruing of each title (*a*). **2624.**

Period  
under the  
third saving  
in favour of  
persons  
under  
disability.

3. By the terms or effect of the third saving, strangers who had a present right of entry or action at the time of the last proclamation, but were then under coverture under age, in prison, out of the realm, or not of whole mind, and strangers to whom a present right of entry or action accrued after the levying of the fine, from any cause or matter prior to the fine, and who were then under any of the above-mentioned disabilities, and those

(*a*) As to these paragraphs relating to the second saving, see 5 Cru. Dig. tit. 35, c. 11, § 7—15, 18—31;

Pres. Shep. T. 20, 22, 23, 30, 32, 33 34 ; 1 Prest. Conv. 238, 240.

claiming under them, were allowed five years from the removal of such disabilities. If they died under disability those claiming under them were allowed five years from their death, or, in case the latter were themselves under disability or disabilities, five years from the removal of such disability or disabilities. But when once the five years allowed for avoiding a fine began to run, the time continued to run against the person having the right, and his heirs general, or heirs of the body, or personal representatives, according to the nature of the estate, notwithstanding any subsequent disability, whether voluntary or not. So that if a person who had a present right of entry or action in respect of an estate of freehold was under no disability at the time of the last proclamation, or if a person to whom a right first accrued after the fine in respect of an estate of freehold was under no disability at the time when his right so accrued, the claim must have been made by him or his heir within five years from that time, even though he died or fell under disability before the expiration of that period, or although his heir was under age, or under any other disability, at the time of his (the ancestor's) decease (a).

**2625.**

PT. III. T. 13,  
CH. 2, s. 2.

## XII. *A Discontinuance, without a Bar in case of Non-claim.*

If a tenant in tail in possession (though subject to a term) levied a fine of corporeal hereditaments *without* proclamations, as an original assurance, or as part of an original assurance,—as, where he levied a fine in the first instance, or conveyed by lease and release, and then levied a fine in pursuance of a covenant contained in the release,—in such case the fine operated as a dis-

Fine without proclamations by a tenant in tail in possession.

(a) See 5 Cru. Dig. tit. 35, c. 11, 30, 31; 1 Prest. Conv. 241, 242 § 38—57; Pres. Shep. T. 20, 22, 23,

Pr. III. T. 13,  
Ch. 2, s. 2.

Definition  
of a discon-  
tinuance.

continuance, which, as it existed in more modern times, may be defined to be, a divestment of an estate tail in things lying in livery, and of the estates in remainder or reversion, and a turning of them into mere rights of action by a feoffment, fine, or recovery, of a tenant in tail in possession. But, even an ordinary conveyance, if accompanied with warranty, of a tenant in tail in possession, operated as a discontinuance so far as regarded the issue in tail, though not as regarded the estates in remainder or reversion (a). 2626.

Fines with-  
out procla-  
mations by  
the issue in  
tail.

If the issue in tail, as we have already observed, levied a fine, without proclamations, in his ancestor's lifetime, the fine so far operated by estoppel as against him, and those claiming through him as heirs in tail, as that, by force of the stat. 27 Edw. 1, c. 1, *De finibus levatis*, it prevented them from averring *quod partes finis nihil habuerunt*; and, as soon as the issue in tail succeeded to the entail, the estate which then existed fed the estoppel. And the fine having created an estate in this way, by its operating first as an estoppel in the ancestor's lifetime, and afterwards as a conveyance after his decease, if the fine was levied with warranty, it had, by reason of the warranty which was annexed to the estate so created, the effect of a discontinuance, so far as the issue in tail were concerned, so that in such case their right of entry was taken away (b). 2627.

Illustration  
of the mean-  
ing of an  
original  
assurance.

In illustration of what is meant by the above expression, "an original assurance," it may be observed, that, if lands were given to A. and the heirs male of his

(a) See 5 Cru. Dig. tit. 35, c. 8, § 21, and c. 12, § 16, 17, 20—24; Co. Litt. 325 a, n. (1); 326 b, n. (1); 327 a, n. (2) I.; 330 a, n. (1); 332 a, n. (1); 333 a, n. (1); 335 a; 372 b, n. (1); Litt. ss. 598, 601, 637; Co. Litt. 339 a; Pres. Shep. T. 3, 35; 1 Prest. Conv. 203—206,

213, 299; Burt. Comp. § 698; Lord *Lyndhurst's* remarks in *Doe d. Thomas v. Jones*, 1 Tyrw. 506; *Doe d. Cooper v. Finch*, 4 B. & Ad. 233.

(b) *Doe d. Thomas v. Jones*, 1 Tyrw. 506.

body, the remainder to B. and the heirs male of his body, the remainder to the right heirs of A., and A. bargained and sold the land by deed indented and inrolled to J. S. and his heirs, and afterwards levied a fine of it sur cognizance de droit come ceo, etc., as a distinct assurance, to him and his heirs, by this the remainder to B. was not discontinued, but the estate of the bargainee lasted so long as there was issue inheritable under the entail, and then determined without entry. But if the fine had been before the bargain and sale, or as part of that assurance, it would have been a discontinuance of the remainder, and a bar to the remainderman in case he failed to claim within five years after the remainder came in possession (a). **2628.**

Pt. III. T. 13,  
CH. 2, s. 2.

The effect of a discontinuance was, that the estates so discontinued were subjected to the Statute of Limitations, 21 Jac. 1, c. 16, whereby a formedon (an action abolished by the stat. 3 & 4 Will. 4, c. 27, s. 36) must have been brought within twenty years after the right of action accrued, unless the party laboured under any of the disabilities there specified (b). But the fine in such case was no bar in the event of non-claim, under the stat. 4 Hen. 7, c. 24, because it was not proclaimed. **2629.**

Consequences of  
a discontinuance.

Another consequence of a discontinuance was, that, as the estates of the persons in remainder and reversion were converted into mere rights of action, their interest could not be granted over or devised (c). **2630.**

To the operation of a fine as a discontinuance, an exception occurred where the remainder or reversion was in the Crown. By the common law, such a remainder or reversion could never be divested; and the stat. 34 & 35 Hen. 8, c. 20, prohibited a tenant in tail, by the

Exception  
in the case  
of a remainder or  
reversion in  
the Crown.

(a) Pres. Shep. T. 27; see also Id. 29, 33, 35; 1 Prest. Conv. 205.

(b) 5 Cru. Dig. tit. 35, c. 8, § 21;

Pres. Shep. T. 32, n. (39).

(c) See 1 Prest. Conv. 206; 2 Cru. Dig. tit. 13, c. 1, § 15; 6 Cru. Dig.

tit. 38, c. 3, § 30.

Pr. III. T. 13, CH. 2, R. 2. gift of the Crown, as a reward for services, from barring even his own issue (a). 2631.

### XIII. *A Discontinuance, and a Bar in case of Non-claim.*

Fine with proclamations by a tenant in tail in possession.

If proclamations were made, and the remainder or reversion was not in the Crown, the fine so levied by a tenant in tail in possession as an original assurance, or as part of an original assurance, was an immediate bar to the entail, and both a discontinuance, and a bar in case of non-claim, as against all strangers, with the exceptions noticed infra, XIV. (b). 2632.

Fine by a tenant in tail after creating a derivative life estate in possession.

And the same was the case if a tenant in tail made a lease for life, and then levied a fine with proclamations (c); because there was no just reason why he should lose his power over the estates in remainder and reversion merely because he had created a derivative estate for life out of his estate tail: for although, as regards such derivative estate, he had only a reversion, yet the relation of his estate tail to the estates expectant on it remained the same as at first. As regarded the estates limited by the instrument under which he claimed, he was still seised of the prior estate; and that being an estate tail, he not only originally possessed, but also continued to retain, the power of discontinuing the estates in remainder and reversion, so as to subject them to the bar in case of non-claim. 2633.

### XIV. *A Bar in case of Non-claim, without a Devestment or Discontinuance.*

Bar of right of entry or action.

In each of the cases above noticed, in which the cognizor was so situated that the fine was both a divestment or

(a) 5 Cru. Dig. tit. 35, c. 9, § 55, c. 13, § 27; and tit. 36, c. 10, § 41, 42; Co. Litt. 335 a; 372 b, n. (3); Burt. Comp. § 707.

(b) See 4 Cru. Dig. tit. 35, c. 8, § 21, and c. 9; Pres. Shep. T. 3; *Doe d. Gilbert v. Ross*, 7 Mees. & W. 102.

(c) *Salvin v. Clerk*, Cro. Car. 156.

discontinuance and a bar in case of non-claim, it might operate in the latter way only, that is, as a bar in case of non-claim, in regard to estates which had been previously converted into rights of entry or action. **2634.**

PT. III. T. 13,  
CH. 2, S. 2.

So, a fine by a person seised in fee simple in possession, whether by right or by wrong, barred the rights or interests of strangers in case of non-claim, though, from the nature of the case, there could be no actual estate in the land for the fine to divest or discontinue. And it is conceived that a fine by a person seised in fee simple in remainder or reversion had the same effect of barring the rights or interests of strangers who had no actual estate in the lands (a), though, of course, it did not affect a preceding estate of freehold (b); because that would have been obviously a mere injustice for which there could be no pretext whatever: and, the estate of the cognizor being a fee simple, of course there could be no remainder or reversion to discontinue or divest. **2635.**

Fine by a  
person  
seised in fee  
simple, in  
possession,  
remainder,  
or reversion.

And where a fine sur cognizance de droit come ceo, etc., was used for the conveyance of a remainder for life or in tail, expectant upon a particular estate of freehold, it would seem that it might operate as a bar in case of non-claim, in regard to persons who had a mere right, when it would not discontinue, divest, or bar those who had actual estates in the lands. It is certain that, if a fine of this kind was levied by a tenant for life or in tail in remainder, even though the tenant for life in possession joined in the fine, it would not disturb the preceding freehold, or the ulterior estate, if any, in remainder or reversion, but had the same effect in that respect as a fine of the second or third kind, which would only operate as a grant of the conusor's estate, without invading or affecting the

Fine by a  
remainder-  
man for life  
or in tail.

(a) See 1 Prest. Conv. 258, 259.

(b) Burt. Comp. § 76, 98.

PT. III. T. 13,  
CH. 2, s. 2.

Fine by a  
tenant in  
tail after  
assigning  
dower.

Fine by a  
tenant for  
life in  
possession.

Reason of  
the differ-  
ence in the  
effect of his  
fine and  
that of a  
remainder-  
man in re-  
gard to de-  
vesting and  
barring  
ulterior  
estates.

estate of any other person (a). And where a tenant in tail, after having assigned dower, levied a fine, it did not affect the estate limited in remainder after his estate tail as to the part assigned as dower; because, as to that part, the tenant in tail had no immediate estate of freehold (b). Yet we have seen that a fine by one who was only a tenant for life, if he was in possession, would divest the estates expectant on his freehold. The reason of the difference would seem to be this: the tenant for life in possession frequently appears, *prima facie*, to be the owner of the inheritance, and he might sometimes be mistaken for the owner thereof by a purchaser in very early times, when land was often transferred by livery of seisin without deed; and therefore the law, which always discouraged laches, would not suffer the possession under the fine to be disturbed, unless the party entitled to the remainder or reversion entered within a limited time. But a remainderman is not the ostensible owner of the property, and therefore there is not the same reason why his fine should have been allowed to divest any ulterior estate; on the contrary, it would have been an encouragement to fraud to have permitted the fine, in such a case, to affect the estates of other persons. Now, as the preceding and the ulterior estates could not be divested by the fine of an intervening remainderman, so neither could they be barred by non-claim on his fine; for non-claim on a fine would not bar any estate or interest which was not divested out of the owner, or in a state of adverse claim; because, if the estate was not divested or in a state of adverse claim, there could be no necessity or reason for a claim (c); and

(a) Pres. Shep. T. 27, 29; 1 Prest. § 63.

Conv. 226; Burt. Comp. § 76, 98;  
*Breedon's Case*; 1 Rep. 76.

(c) 5 Cru. Dig. c. 13; Pres. Shep  
T. 23; Co. Litt. 332 b, n. (1).

(b) See 5 Cru. Dig. tit. 35, c. 14.



therefore, when the Statute of Non-claim (4 Hen. 7, c. 24) Pr. III. T. 13, CH. 2, s. 2. enacts that strangers shall be barred, unless they "take their actions and entry" within the time prescribed, Construction of the Stat. of Non-claim. it pre-supposes that the interests of such strangers shall have been converted into, or were in their nature mere rights; and consequently it does not bar those whose estates were not divested; and hence a fine by a remainderman would not bar any ulterior vested remainder or reversion. But it would seem that a fine by the owner of any subsequent interest of freehold would bar a right of entry or action, in case of non-claim, by force of the express words of the statute, though it would not bar a preceding or a subsequent estate (a). **2636.**

There were several cases in which non-claim on a fine, although duly proclaimed, was no bar: **2637.** Where a fine, though duly proclaimed, was no bar

A fine was absolutely void, as far as strangers were concerned, if none of the parties, at the time of levying the fine, had an estate of freehold. But, if either the cognizor or the cognizee had a freehold estate, the fine was not void, even as to strangers (b); for the words of the statute are, "saving to every person or persons not party nor privy to the said fine, their exception to avoid the same fine, by that,—that those who were parties to the fine, nor any of them, nor no person or persons to their use, nor to the use of any of them, had nothing in the lands and tenements comprised in the said fine at the time of the said fine levied" (c). 1. Where none of the parties had any freehold.

The author of "The Touchstone" and Mr. Preston have laid it down, that a fine by or to a remainderman or reversioner cannot be avoided by the plea *quod partes finis nihil habuerunt* (d). And this opinion, which was Whether a fine by or to a remainderman or reversioner could be avoided by the plea of

(a) See 1 Prest. Conv. 259, 300.

(b) Burt. Comp. § 96, 101; 1 Prest. Conv. 223, 258.

(c) 5 Cru. Dig. tit. 35, c. 5, § 21; Burt. Comp. § 95.

(d) Pres. Shep. T. 13, 29; 1 Prest. Conv. 258.

Pr. III.T.13,  
Ch. 2, s. 2.

quod partes  
finis nihil  
habuerunt.

also the opinion of Mr. Burton (*a*), clearly seems to be in accordance with the words of the statute above quoted, and to be the correct view. Mr. Cruise, however, states that this opinion is erroneous, and then proceeds to give some cases by which, as he supposed, the contrary doctrine was established (*b*). But, to the writer of these pages these cases appear only to show what we have already seen to be the case, namely, that a fine by a remainderman or reversioner would not affect the owner of the preceding freehold or the ulterior remainderman or reversioner, though, as to other strangers, it would operate as a bar in case of non-claim. And it would have this effect as well in favour of the preceding freeholder and the ulterior remainderman or reversioner, as of the cognizor, because it is a general rule, that all acts by the owner of a particular estate and the owner of a remainder or reversion enure to the benefit of each other, if made on the foundation of their common seisin or privity, and not adversely (*c*).  
**2639.**

A freehold  
by wrong  
was suffi-  
cient.

A fine was valid as to strangers as well as parties and privies, even though the estate of freehold in the cognizor or cognizee was only an estate by wrong, whether gained by a feoffment or otherwise (*d*). So that a fine, with proclamations, by a disseisor, barred an ejectment, unless there was an actual entry within five years from the levying the fine (*e*). **2640.**

What will  
give a seisin  
by wrong.

With regard to what is sufficient to give a seisin by wrong, Lord Hardwicke considered that the same acts that are sufficient to gain a seisin, when done by a person who has right, are not sufficient in the case of a wrong-

(*a*) Burt. Comp. § 96.

(*b*) 5 Cru. Dig. tit. 35, c. 14,  
§ 61—63.

(*c*) Pres. Shep. T. 29 ; 1 Prest.  
Conv. 258, 259.

(*d*) 1 Prest. Conv. 224, 225, 258,  
262, 301 ; *Davies v. Lowndes*, in  
error, 6 Man. & Gr. 521.

(*e*) *Doe d. Anderson and Wife*  
*v. Thomas*, 1 C. & P. 91.

doer, but he ought to have a continuance of possession without interruption, to gain a seisin (a). And if one of two persons who claim an estate as heir to another levies a fine before receipt of any rent, and afterwards obtains a verdict, and rent is paid to him for a period antecedent to the fine, but the other party subsequently succeeds in establishing his claim, the reception of a rent by the former will not be taken to be evidence of a seisin by relation : for fictions and relations in law are only good to support right, and consequently the fine will not operate as a bar to the ejectment of the other party (b). And where a younger son, who managed his father's property, continued in possession for several years after his father's decease, claiming as heir to his father, on the ground of the illegitimacy of an elder son, and levied a fine, such fine would not operate ; because, by the mere wrongful continuance of an originally rightful permissive possession, no freehold is acquired, even by wrong ; such a continuance of the possession not amounting to a disseisin, abatement, or intrusion (c). But, ordinarily, if the heir entered, notwithstanding a devise in favour of another person, and levied a fine, it barred the devisee after five years' non-claim (d). And if a person entered under a void devise, he thereby acquired a freehold by abatement ; so that if he levied a fine, it was a bar in case of non-claim (e). 2641.

Pr. III. T. 13,  
Ch. 2, s. 2.

Receipt of  
rent by a  
person  
claiming as  
heir.

Wrongful  
continuance  
of an origin-  
ally rightful  
permissive  
possession.

Entry by  
heir against  
devisee.

Entry by a  
devisee  
under a void  
devise.

2. Where the possession of the cognizor was the possession of a third person, such person was not barred by the fine and non-claim ; because it was necessary that the party levying the fine should have a possession

2. Where the  
cognizor's  
possession  
was the  
possession of  
a third  
person.

(a) *Tonnend v. Ash*, 3 Atk. 336, quoted 5 Cru. Dig. c. 5, § 34.

(b) *Doe d. Ledgbird v. Lawson*, 8 B. & C. 606.

(c) *Doe d. Davis v. Davis*, 12 Price 756.

(d) 5 Cru. Dig. tit. 35, c. 5, § 28; Co. Litt. 240 b, n. (2) ; 1 Prest. Conv. 224; *Doe d. Cadwalader v. Price*, 16 Mees. & W. 603.

(e) 5 Cru. Dig. tit. 35, c. 5, § 27; 1 Prest. Conv. 224.

Pt. III. T. 13,  
Ch. 2, s. 2.

adverse to that of the person to be barred, for otherwise there would be no occasion for a claim (*a*). **2642.**

Terms for

Thus, in case of non-claim, a fine was a bar to a term of years in those cases only where the possession of the cognizor was not the possession of the termor. And hence, where a purchaser at the time of his contract was not aware of a term, and its existence would have endangered or affected his title, a fine levied with five years' non-claim would have operated as a bar to the trustee of the term (*b*). But an attendant term is not barred by a fine levied by the owner of the fee, if it was not his intention that the term should be barred (*c*). **2643.**

So, where a lessor continued in possession, and levied a fine, it was no bar to his lessee; because a lessor is considered as tenant at will to his lessee (*d*). **2644.**

Joint  
tenancy.

And so, if one of two joint tenants in fee levied a fine of the whole, this did not amount to an ouster of his companion; but it was a severance of the jointure, though they continued to be in of the old use (*e*). **2645.**

3. Where  
there was no  
divestment  
or state of  
adverse  
claim.

3. No estate or interest was barred by fine and non-claim which was not divested and turned to a right of entry or action, or in a state of adverse claim (*f*). **2646.**

And hence non-claim on a fine would not bar a term to commence at a future time, or a condition subsequent, before it was broken; for while it conferred no right of immediate entry there was no ground for a claim. But, as soon as it conferred a right of immediate entry, non-claim by the person interested in the term, or by the

(*a*) 5 Cru. Dig. tit. 35, c. 13, § 12.  
But see c. 11, § 33—35, and c. 13,  
§ 11.

(*b*) 3 Sugd. V. & P. 2, pl. 2; 5  
Cru. Dig. tit. 35, c. 10, § 41, 42.

(*c*) 3 Sugd. V. & P. 39, pl. 16;

5 Cru. Dig. tit. 35, c. 10, § 41, 42.

(*d*) 5 Cru. Dig. tit. 35, c. 10,  
§ 44.

(*e*) 5 Cru. Dig. tit. 35, c. 5, § 18,  
and c. 13, § 13.

(*f*) See 1 Prest. Conv. 223, 227.

person who was to take advantage of the breach of the condition, began to be a bar to him, though the fine were levied before the right of immediate possession existed. The same is the case with an authority to executors to sell (a). **2647.**

PT. III. T. 13,  
CH. 2, s. 2.

4. A fine and non-claim were no bar to the Crown ; for nullum tempus occurrit regi (b). **2648.**

4. In the  
case of the  
Crown.

5. Ecclesiastical corporations, *as such*, whether aggregate, or sole, could not be barred by non-claim on a fine within the period specified in the Statute of Non-claim. But a sole ecclesiastical corporation, as a bishop, parson, or vicar, might be *personally* barred if he failed to claim within five years after his title accrued ; and each of his successors might be personally barred in a similar event ; and each successive head of a corporation aggregate might be personally barred in the same manner (c). **2649.**

5. In the  
case of an  
ecclesiasti-  
cal corpora-  
tion.

6. If a tenant in tail of an incorporeal hereditament, whether in possession or remainder, levied a fine, it barred the entail, and changed the estate tail into a qualified or base fee, determinable on the death of the cognizor and the failure of issue inheritable according to the entail, but it had no effect on the ulterior estates in remainder or reversion (d). And an incorporeal hereditament in a third person, or a right to sue execution on a judgment, was not barred by a fine levied of the land (e) ; because it was collateral to the seisin or ownership of the land, and therefore not affected by any transfer of the land. **2650.**

6. In the  
case of  
incorporeal  
heredita-  
ments.

7. The same was the case with powers simply col-

7. In the

(a) See 1 Prest. Conv. 231, 232.

Dig. tit. 35, c. 13, § 4.

(b) 5 Cru. Dig. tit. 35, c. 9,  
s. 55, and c. 13, § 2 ; 1 Prest.  
Conv. 235.

(d) Burt. Comp. § 700.

(e) 5 Cru. Dig. tit. 35, c. 13, §  
22 ; Pres. Shep. T. 23 ; 1 Prest.  
Conv. 231.

(c) 1 Prest. Conv. 235 ; 5 Cru.

PT. III. T. 13,  
CH. 2, S. 2.

case of  
powers  
simply  
collateral.

8. In the  
case of cer-  
tain persons  
who are re-  
lieved in  
equity.

lateral for the same reason, and because the donee of such a power could not have made an entry (a). **2651.**

8. There were others who, though barred at law, might be relieved in equity; as in the case of cestuis que trust under an express or implied trust, where the fine was levied by a trustee to a person who had notice of the express trust, or by a devisee to a person who had notice of a charge amounting to an implied trust, or by a person coming in by conveyance from a trustee, without any valuable consideration, or with fraud, or notice of trust or fraud; and in other cases of fraud (b); and in cases where Courts of Equity limit the operation of fines to the purposes for which they were intended, so as to prevent them from barring a jointure, or from operating farther than was intended by the decree in pursuance of which they were levied, or from operating to other uses than those intended by marriage articles (c). And a Court of Equity will not suffer an infant to be barred by the laches of his trustee (d); nor an equity of redemption to be barred by a mortgagee; nor a mortgagee to be barred by a mortgagor (e). **2652.**

How a fine  
could be  
avoided by  
a person  
having a  
right of  
entry.

It may here be observed, that a person who had a right of entry, in order to have avoided a fine, where it was levied with proclamations, must not only have entered on the land, or, if prevented from entering, have made his claim as near the land as might be, but must have also brought an action of ejectment

(a) 5 Cru. Dig. tit. 35, c. 10, § 59—62.

(b) See Story's Eq. Plead. s. 773—775; 3 Sugd. V. & P. 446; 5 Cru. Dig. tit. 35, c. 10, § 31—34, and c. 14, § 71—81, 86.

(c) Story's Eq. Plead. s. 776; 5 Cru. Dig. tit. 35, c. 10, § 23—25, and c. 14, § 87, 88.

(d) 5 Cru. Dig. tit. 35, c. 14, § 83.

(e) Id. § 85; 1 Prest. Conv. 233.

within one year afterwards, and prosecuted the same (a). Pt. III.T.13, Ch. 2, s. 2.  
**2653.**

The entry of the particular tenant restored the estates in remainder or reversion, as well as the particular estate (b). And so the entry of a copyholder restored the estate of the lord (c). And the entry of one joint tenant, coparcener, or tenant in common, avoided the fine as to the others (d). **2654.**

Effect of an entry by a particular tenant, copyholder, or part owner.

In order to have avoided a fine, a person who had a right of action only must have brought a real action: an action of ejectment was not sufficient (e). The filing of a bill in Chancery would not have prevented the bar by non-claim, except in the case of a cestui que trust (f). **2655.**

How a fine could be avoided by a person having a right of action.

A fine sur done, grant, et render, being a double fine, gave a new estate to the cognizor, so that, if before the fine he was seised in fee ex parte maternâ, and he took back an estate in fee simple, the descent was thereby altered to a descent ex parte paternâ, although the seisin of the cognizee, from whom such new estate proceeded, being but for an instant, did not entitle his widow to dower. The other fines being single fines, when levied by a tenant in fee simple, did not give a new estate: so that, if a person seised in fee ex parte maternâ levied a fine sur cognizance de droit come ceo, etc., and either made no declaration of the uses of it, or declared it to be to the use of himself and his heirs, the lands descended ex parte

Difference between a fine sur done, grant et render, and other fines as regards creating a new estate.

(a) 5 Cru. Dig. tit. 35, c. 14, § 43, 45—49, 55; Co. Litt. 252, n. (1); 1 Prest. Conv. 247.

(b) 5 Cru. Dig. tit. 35, c. 14, § 52; Pres. Shep. T. 35; 1 Prest. Conv. 227, 247.

(c) 5 Cru. Dig. tit. 35, c. 14,

§ 52; Pres. Shep. T. 35.

(d) 5 Cru. Dig. tit. 35, c. 14, § 53.

(e) 5 Cru. Dig. tit. 35, c. 14, § 41, 43.

(f) Id. § 42.

PT. III. T. 18,  
CH. 2, S. 2. maternâ, because the old use resulted to him (*a*). Such a fine, however, by the owner of a particular estate in possession, unless restricted in its operation to such an estate as he might lawfully pass, created a new and tortious estate in fee. **2656.**

Fines levied  
in local  
Courts.

Various statutes, the latest of which was 43 Eliz. c. 15, communicated the properties of a fine levied in the Court of Common Pleas according to the stat. 4 Hen. 7, to fines levied in the counties palatine of Durham, Lancaster, and Chester, and in Wales and the Isle of Ely (*b*). **2657.**

(*a*) 5 Cru. Dig. tit. 35, c. 12, § Conv. 211.  
37, 40; Pres. Shep. T. 4; 1 Prest. (*b*) Burt. Comp. § 78.



## CHAPTER III.

## OF COMMON RECOVERIES.

## SECTION I.

*Of Common Recoveries generally.*

A COMMON RECOVERY is an action, either actual or fictitious, not compromised, but carried on through every regular stage of proceeding, by means of which lands which were the subject of the action were recovered against the tenant of the freehold, and all persons were bound, as by an actual adjudication of the right, and an absolute fee simple was thereby vested in the recoveror (a). **2658.**

PT. III.T.13  
CH. 3, s. 1.

Definition of  
a recovery.

The mode of suffering a recovery with single voucher was this: the person to whom the land was intended to be conveyed, the demandant or recoveror, brought an action against the person who was to suffer the recovery (the tenant or recoveree), by suing out a writ, called a *præcipe quod reddat*, against him. The latter then vouched or called another person to defend the title, upon the alleged ground of such other person's having conveyed the land to him with a warranty. The person so vouched, who was generally the crier of the Court, and was called the common vouchee, made default, and thereupon judgment was given for the defendant to recover the lands against the tenant, and the tenant had judgment to recover of the vouchee lands of equal value in recompense

Mode of suffering a recovery.

(a) 2 Bl. Com. 357.

PT. III.T.13,  
CH. 3, s. 1.

for the lands so warranted by him; but he recovered nothing, as the common vouchee usually had no lands of his own. It was more usual, however, to have a recovery with double voucher at the least. And, in the case of a double voucher, an estate of freehold was first conveyed to some other person against whom the præcipe was brought, and then he vouched the tenant in tail, who vouched over the common vouchee (a). **2659.**

Abolition of  
recoveries.

By the stat. 3 & 4 Will. 4, c. 74, s. 2, no recovery was to be suffered after the 31st of December, 1833, unless upon a writ sued out on or before that day. **2660.**

Certain  
mistakes  
remedied by  
statute.

By s. 5 of the same statute, recoveries are not invalid in consequence of having been suffered in unlawful or unauthorised Courts. **2661.**

By ss. 8, 10, 11, of the same statute, certain misnomers, misdescriptions, or omissions in a recovery, the non-enrolment of the deed making the tenant to the writ, and the omission to make the tenant to the writ, are cured in certain cases. **2662.**

By s. 3 of the stat. 5 Vict. sess. 2, c. 32, certain recoveries in Wales and Cheshire are validated. **2663.**

## SECTION II.

### *Of the Operation of Recoveries.*

PT. III.T.13,  
CH. 3, s. 2.

Efficacy  
varies with  
circum-  
stances.

Recoveries vary in their efficacy according to the mode in which they were suffered, and the legal character of the parties; and they may operate in the following ways:— **2664.**

Modes of  
operation.

- I. By way of conclusion or estoppel.
- II. As an ordinary conveyance.
- III. As an extinguishment of a right of entry or action.

(a) 2 Bl. Com. 358—9.

IV. As an extinguishment of a power appendant or in gross. PT. III.T.13,  
CH. 3, s. 2.

V. As a revocation of a devise.

VI. As a conveyance of the estate of a married woman or as an extinguishment of her dower.

VII. As a forfeiture.

VIII. As a discontinuance.

IX. As an instantaneous bar of contingent remainders.

X. As an instantaneous bar of an estate tail, and of the remainders and reversion expectant thereon, etc., and a creation of a fee out of the estate tail. **2665.**

### I. *Conclusion or Estoppel.*

A recovery, unless suffered by a femme covert, as such would operate as an estoppel as against the parties and their heirs general, in the same manner as a fine, even though suffered by a tenant in fee, or without a voucher, or without a proper tenant to the præcipe (*a*), that is, a person against whom the writ of entry was brought, and who, at the time of the writ being so brought against him, or before judgment given, had the immediate estate of freehold either by right or by wrong (*b*). **2666.**

But a recovery by a tenant in tail does not operate by estoppel against the issue in tail, or persons in reversion or remainder, or other strangers (*c*). **2667.**

### II. *An ordinary Conveyance.*

Even where a recovery is void or voidable, as against heirs in tail and the remaindermen and reversioners, it may be good as an ordinary conveyance, as between the parties themselves and their heirs general, and all others, except heirs in tail, who must make title by the persons

Recovery by a tenant in tail without a proper tenant to the præcipe, or without a voucher.

(*a*) 5 Cru. Dig. tit. 36, c. 2, § 57 ; c. 8, § 2 ; c. 9, § 1 ; Pres. Shep. T. 42, n. (80), 48, 49 ; 1 Prest. Conv. 4, 120 ; Burt. Comp. § 107.

(*b*) 1 Prest. Conv. 48 ; Pres. Shep. T. 42.

(*c*) 1 Prest. Conv. 5, 6, 88, 92, 95, 97, 98, 142.

Pr. III. T. 13,  
CH. 3, s. 2.

suffering the recovery (a). This is the case with a recovery suffered by a tenant in tail without a proper tenant to the præcipe, or without a voucher. Such a recovery was good as a conveyance in fee, as between the tenant in tail himself and the other parties to it; and it was only voidable by, and not void as against, the issue in tail, remaindermen, and reversioners, and other strangers: it was good against them until avoided by them (b). **2668.**

Recovery  
by a tenant  
in tail operating  
as a confirmation.

A recovery duly suffered by a tenant in tail, after a mortgage, charge, lease, conveyance or settlement made by him, would operate as a confirmation of such conveyance or settlement, by barring the estate tail and the remainders and reversion, so as to preclude the issue in tail and those in remainder or reversion from avoiding the conveyance or settlement (c). **2669.**

Recoveries  
by spiritual  
persons.

Recoveries by spiritual persons, such as bishops, deans, and parsons, of their ecclesiastical lands, were good against themselves, but would not bind their successors (d). **2670.**

Recovery by  
a tenant in  
fee simple  
or qualified.

A recovery, even without a proper tenant to the præcipe, or without a voucher, might operate as a conveyance by any person who had an estate of inheritance, not being an estate tail (e). **2671.**

Recovery  
operating by  
estoppel at  
first.

A recovery, which could only operate by estoppel at first, might in some cases, as in the case of an executory interest or an expectancy, at length take effect as a conveyance, in the same manner as a fine under similar circumstances (f). **2672.**

### III. *An Extinguishment of a right of Entry or Action.*

It would seem that a recovery would operate as an

(a) See Pres. Shep. T. 48, 49.

(d) Pres. Shep. T. 44.

(b) 1 Prest. Conv. 86—100, 120.

(e) 1 Prest. Conv. 5, 6, 86—100,

(c) 1 Prest. Conv. 22; 2 Pres.

120.

Shep. T. 287.

(f) See Fearne, 366.

extinguishment of a right of entry or action in those cases in which a fine would have that effect; as in the before-mentioned case of a disseisee (a). **2673.**

Pr. III.T.13,  
Ch. 3, s. 2.

#### IV. *Extinguishment of a Power Appendant or in gross.*

If the operation of a recovery by a donee of a power appendant or in gross was not qualified by some other instrument connected with it, and it created an interest totally inconsistent with the exercise of the power, it extinguished the power, on the general principle that a person is not permitted to defeat his own grant (b). So that, if a tenant for life, with a power of appointment in favour of his children, with remainder in default of appointment to his eldest son in tail, joined with such son in suffering a recovery, it extinguished the power (c). **2674.**

#### V. *A Revocation of a Devise.*

If a person suffered a recovery of lands which he had devised previously to the recovery, and also previously to any other assurance connected with the recovery and forming part of the same transaction, such as a deed to make a tenant to the præcipe, the recovery operated as a revocation of the devise; even though he took back the same estate, as when he was seised in fee, and made no declaration of the uses of the recovery (d). **2675.**

#### VI. *A Conveyance of a Married Woman's Estate, or an Extinguishment of Dower.*

If a married woman joined in a recovery, it would operate as a conveyance of her estate, or as an extinguish-

(a) Supra, par. 2588.

(c) *Smith v. Death*, 5 Madd. 371.

(b) See Co. Litt. 342 b, n. (1), IV.—VI. 3; and *Smith v. Death*, 5 Madd. 371.

(d) See 6 Cru. Dig. tit. 38, c. 6, § 72—78; 1 Prest. Conv. 196, 197.

Pt. III. T. 13,  
Ch. 3, s. 2.

ment of her dower; because a married woman could always be bound by a judgment in an adverse suit, of which a recovery was an imitation, and because she was privately examined as to her consent (*a*). 2676.

### VII. *A Forfeiture.*

Recovery  
against or  
voucher of  
a tenant in  
tail after  
possibility  
of issue  
extinct,  
tenant by  
the curtesy,  
or other  
tenant for  
life.

By the stat. 14 Eliz. c. 8, it is enacted, that a recovery prosecuted against a tenant in tail after possibility of issue extinct, tenant by the curtesy, or any other tenant for life, or any other person with voucher over of such particular tenant, without the concurrence of the person in remainder, shall be utterly void and of none effect, as against all persons in remainder or reversion (*b*). And a recovery by a tenant for life, without the concurrence of the remainderman or reversioner, operated as a forfeiture, unless he himself had a remote remainder in tail (*c*). 2677.

Fine or  
recovery by  
a woman of  
a marital  
estate.

And in consequence of the stat. 11 Hen. 7, c. 20, a fine or recovery levied or suffered by a woman, of an estate in dower, or for life, or in tail, which was limited to or for her, either solely, or jointly with her husband, and which moved from her husband or his ancestors, was utterly void and of no effect, if levied or suffered after his decease, unless had with the consent of the heirs next inheritable to her, or of the person next in remainder (such consent appearing on record); or unless the lands were limited to the wife in tail general, without any limitation in favour of the husband or his issue or relations from whom the estate moved. And in the case of such a void recovery, the person in remainder or reversion was enabled to enter immediately (*d*). But an

(*a*) 5 Cru. Dig. tit. 36, c. 8, § 3;  
Pres. Shep. T. 39; 1 Prest. Conv. 4.  
See *supra*, par. 510.

(*b*) 5 Cru. Dig. tit. 36, c. 5, §  
23.

(*c*) Id. c. 9, § 8—11; Pres. Shep.  
T. 40, 49, n. (3); 1 Prest. Conv.  
202; Burt. Comp. § 746.

(*d*) 5 Cru. Dig. tit. 36, c. 10, §  
7—31; see also Pres. Shep. T. 5, 28,

alienation merely for the term of the widow's life is excepted in the statute (a). And it does not extend to copyholds (b). **2678.**

It may be mentioned, in this place, that, by the stat. 32 Hen. 8, c. 28, a fine or recovery by a husband alone, who was seised in right of his wife, shall not be prejudicial to her or her heirs, or the person in remainder or reversion (c). **2679.**

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Fine or  
recovery by  
a husband  
alone of his  
wife's es-  
tate.

### VIII. *A Discontinuance.*

A voidable recovery by a tenant in tail in possession operated as a discontinuance (d). **2680.**

### IX. *An instantaneous Bar of Contingent Remainders.*

Where a recovery was suffered by the owner of an estate for life in possession, and the legal estate was not vested in trustees, it occasioned the destruction, or, in other words, it operated as an instantaneous bar of contingent remainders which were expectant on such estate for life, and unsupported by any other particular estate of freehold (e). For although by the stat. 14 Eliz. c. 8, it is enacted, that recoveries by tenants for life shall, as against "persons to whom any reversion or remainder . . . may appertain, and against their heirs and successors, be clearly and utterly void and of none effect," yet that refers to vested remainders only (f). **2681.**

43; 1 Prest. Conv. 147; Burt. Comp. § 708.

(a) Burt. Comp. § 708.

(b) 1 Prest. Conv. 148.

(c) 5 Cru. Dig. tit. 36, c. 10, § 33; see also Pres. Shep. T. 15.

(d) See Co. Litt. 330, a, n. (1); 335 a, n. (2). As to the nature and

effect of a discontinuance, see supra, par. 2626—2631.

(e) 5 Cru. Dig. tit. 36, c. 8, § 31—34; Smith's Executory Interests, § 766, 767, 770, 783.

(f) *Doe d. Davies v. Gatacre*, 5 Bing. (N. S.) 609.

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*X. An instantaneous Bar of an Estate Tail, and of the Remainders and Reversion expectant thereon, etc., and a creation of a Fee out of the Estate Tail (a).*

Effect where  
the writ was  
brought  
against a  
tenant in  
tail himself  
when in  
possession.

Where the writ was brought against a tenant in tail himself when in possession, and he vouched over another person, it was an instantaneous bar of the estate tail of which he was so seised in possession, unless the estate tail was granted by the Crown as a reward for services, and the remainder or reversion was in the Crown at the time of the recovery. But a recovery so suffered was no bar to any other estate in him, or in another person, such as a remainder in tail, or an estate tail after a disseisin or discontinuance or alienation in fee of or by a tenant in tail (b). 2682.

Effect where  
a tenant in  
tail in  
possession or  
vested  
remainder  
came in as  
vouchee.

Where a tenant in tail in possession conveyed an estate of freehold to another person to make him tenant to the præcipe, and he himself came in as vouchee, the recovery barred not only the estate of which he was seised in possession, but also every other estate that had ever been in him. And where the writ was brought against a tenant for life in possession, and a person having a vested estate tail in remainder came in as vouchee, it would bar his estate tail in remainder, and also any latent right that was in him (c). But a re-

Recovery by  
a person  
having a  
contingent  
or expectant  
interest in  
tail.

Recovery  
in which the  
writ was  
brought  
against a

covery by a donee under a contingent interest in tail, or by an expectant heir in tail, would not bar the issue or those in remainder or reversion. And a recovery would not bar a remainder in tail, if the writ were brought against the tenant in tail in remainder, as well as against

(a) See *Parker v. Tootal*, 11 H. L. Cas. 143.

(b) 5 Cru. Dig. tit. 36, c. 10, § 40—49; c. 7, § 45—53; 2 Bl. Com. 359; Co. Litt. 372 b; Pres. Shep. T. 37 n. (57), 39, 43, 45, 46;

1 Prest. Conv. 123.

(c) 5 Cru. Dig. tit. 36, c. 7, § 54; 2 Bl. Com. 359; Pres. Shep. T. 42, 45; 1 Prest. Conv. 126, 138; Burt. Comp. § 686, etc.



the tenant for life, and the former vouched over, but was not vouched himself (a). **2683.**

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And in each of these cases, where the tenant in tail came in as a vouchee, and the estate tail was so barred, the recovery was also an instantaneous bar to the remainders and reversion dependent on such estate tail and not vested in the Crown (b), and to all conditions subsequent or mixed (c), not being conditions for payment of rent to the donor; and to all special or collateral limitations, and conditional limitations annexed to such estates tail, and all executory interests subsequent to such estates tail; and to all estates, charges, and incumbrances derived out of such remainders and reversion (d), including any estate in fee into which a remainder or reversion depending on such estates tail might have been converted by a prior recovery suffered by a person entitled to such remainder or reversion (e); and to collateral interests, such as rents, liens, judgments, and powers appendant or in gross, where the recovery was not qualified, and prevented from having this effect by some other assurance connected with the recovery, and showing that the recovery was not intended to extinguish such interests (f). **2684.**

remainder-  
man in tail.  
Barring  
remainders  
and rever-  
sions,

conditions,

limitations,

executory  
interests,  
derivative  
estates,  
charges,  
and incum-  
brances,

and colla-  
teral inter-  
ests.

A recovery, by barring an entail and destroying the estates expectant thereon, etc., created a fee simple out of the estate tail, or, at least, a fee commensurate with the estate, which, at the time of granting the entail, was

Creation of  
a fee simple  
out of the  
estate tail.

(a) Pres. Shep. T. 44—46; 1 Prest. Conv. 142.

(b) 5 Cru. Dig. tit. 36, c. 10, § 45, 53—56; Pres. Shep. T. 40, 43, 45; *Earl of Scarborough v. Doe d. Savile*, 3 Ad. & Ell. 897.

(c) Smith's Executory Interests, § 11—22; *Earl of Scarborough v. Doe d. Savile*, 3 Ad. & Ell. 897.

(d) See 5 Cru. Dig. tit. 36, c. 7, § 30—36; c. 8, § 25—29; Co. Litt.

327 a, n. (2), II. 1; 2 Bl. Com. 361; Fearne 424, 425; Smith's Executory Interests, § 34—36, 148, 149; Pres. Shep. T. 40; Pres. Shep. T. 40, and n. (72); 1 Prest. Conv. 3, 21.

(e) Pres. Shep. T. 41; 1 Prest. Conv. 17, 141.

(f) 1 Prest. Conv. 5; Co. Litt. 342 b, n. (1), VI. 3; *Smith v. Death*, 5 Madd. 371.

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What were  
not barred.  
1. Estates  
expectant  
on an estate  
tail after  
possibility  
of issue  
extinct.

2. Powers  
simply  
collateral.

3. Inherent  
conditions.

4. Estates  
and charges  
created by  
the reco-  
veree.

5. Estates,  
etc., to  
which the  
donor's  
estate was  
subject.

6. Estates  
not sub-  
sequent to  
that of the  
recoveror.

vested in the donor (*a*), even though the tenant in tail declared no uses, or the uses declared were void (*b*). **2685.**

But, 1, when a tenant in tail became a tenant in tail after possibility of issue extinct, he lost the power which he before had of barring the estates and interests of others (*c*). **2686.**

2. A recovery was no bar to powers simply collateral (*d*). **2687.**

3. Nor to any inherent condition annexed to estates tail for payment of rent to the donor (*e*). **2688.**

4. Nor to any estates or charges which were created by the tenant in tail himself (*f*). On the contrary, since it would be contrary to justice that a person should defeat his own contract, a recovery suffered by a tenant in tail, for whatsoever purpose suffered by barring the entail, let in and confirmed all the estates, charges, and incumbrances which he had created, and which were before defeasible by the issue, so that they took place before any charge that was made on the lands by or after the recovery (*g*). **2689.**

5. Nor was a recovery a bar to any estates, charges, limitations, or conditions to which the estate of the donor of the entail was subject (*h*). So that, if the person who created an estate tail had only a limited or determinable interest, the recoveror had such estate only as was in the donor, and not a fee simple (*i*). **2690.**

6. Nor was a recovery a bar to any estates or interests which were not subsequent, in point of limitation, to the estate of which the recovery was suffered (*j*). **2691.**

(*a*) See 5 Cru. Dig. tit. 36, c. 9, § 7; 2 Bl. Com. 361; 1 Prest. Conv. 1.

(*b*) *Tanner v. Radford*, 6 Sim. 21.

(*c*) 1 Prest. Conv. 144.

(*d*) 5 Cru. Dig. tit. 36, c. 8, § 24.

(*e*) Id. § 26, 27, 30.

(*f*) See Id. c. 9, § 7; Pres. Shep. T. 41, 47; 1 Prest. Conv. 16.

(*g*) Id. § 2—7.

(*h*) Id. c. 8, § 26; Pres. Shep. T. 40, 47; 1 Prest. Conv. 17.

(*i*) Pres. Shep. T. 38; 1 Prest. Conv. 2, 140.

(*j*) 5 Cru. Dig. tit. 36, c. 10, § 3;

Thus, if a remote remainderman in tail, with the assistance of the owner of the immediate freehold, or if a tenant for life in possession, with a remote remainder in tail in himself, suffered a recovery, it barred his estate tail and the remainders and reversion expectant thereon, but was no bar to the remainders intervening between the immediate freehold and his estate tail (*a*). And so, if a term for years was limited to arise before an estate tail, even though for the purpose of raising a sum of money in case of a failure of issue of the parent to whose issue the estate tail was given, it was not barred by a recovery suffered of the estate tail (*b*). And so a recovery by a husband, in which his wife did not join, was no bar to her dower. There is an Act of Parliament, Stat. Westminster 2, c. 4, to this effect (*c*); but it is conceived that, in accordance with the general principle, the same would have been the case independently of that statute.

**2692.**

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Instances of  
an inter-  
vening  
remainder.

Instance of  
a term  
before an  
estate tail  
to raise  
money on  
failure of  
issue.

Dower.

Where two persons were seised as joint tenants for life, with a remainder in tail to one of them, and the person who had the remainder in tail suffered a recovery, it severed the jointure, and barred the estate tail and the remainder over, as to a moiety, but no more (*d*), because joint tenants are each seised of an undivided moiety of the whole. And where land was limited, before marriage, to a man and his intended wife and the heirs of their bodies, and the husband suffered a recovery, in which he was vouched, the recovery was a good bar to the estate tail as to the husband's moiety (*e*).

**2693.**

Distinction  
between  
joint te-  
nants,

Co. Litt. 203 b, n. (1); 1 Prest. Conv. 16, 141.

(*a*) 1 Prest. Conv. 16, 17; Pres. Shep. T. 41; 5 Cru. Dig. tit. 36, c. 10, § 6.

(*b*) *Eales v. Conn*, 4 Sim. 65.

(*c*) 5 Cru. Dig. tit. 36, c. 8, § 5, 6.

(*d*) 5 Cru. Dig. tit. 36, c. 7, § 25 26; 1 Prest. Conv. 125.

(*e*) 5 Cru. Dig. tit. 36, c. 7, § 25, 26; 1 Prest. Conv. 125, 143.

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CH. 3, s. 2.

and tenants  
by entire-  
ties, in  
regard to  
the power  
of barring.

But if lands were given, *after* marriage, to husband and wife and the heirs of their two bodies, remainder over, so that they were seised in tail as tenants by entireties, a recovery by the husband alone was no bar to the estate tail, remainder, or reversion, for any part of the land; because, in this case, the husband had no distinct interest (*a*). And if land was limited, *after* marriage, to husband and wife for life and to the heirs of the body of the husband, and the husband alone suffered a recovery, with single voucher, it was no bar, even as to a moiety; because the limitation to the heirs of the body of the husband was not executed in possession absolutely; and the husband and wife took by entireties under the first limitation; so that the husband took no distinct interest in possession; and a recovery with single voucher could have no effect except on an estate in possession. But the recovery, in such a case, was a bar to the remainder, if the husband came in as vouchee, though it did not bar the estate of the wife for her life, after the husband's death (*b*). **2694.**

7. Marital  
estates tail.

7. A woman could not bar a marital estate tail within the stat. 11 Hen. 7, c. 20, already noticed: a recovery suffered by her of such an estate was void (*c*). **2695.**

8. Estates  
tail granted  
by the  
Crown as a  
reward for  
services, and  
remainders  
and rever-  
sions in the  
Crown.

8. In consequence of the stat. 34 & 35 Hen. 8, c. 20, where an estate tail was granted by the Crown as a reward for services, and the remainder or reversion was in the Crown at the time of a recovery suffered by the tenant in tail, such recovery could not bar either the entail or the remainder or reversion in

(*a*) See Pres. Shep. T. 46; 1 Prest. Conv. 124. 46; 1 Prest. Conv. 55—57, 124, 125; Fearne 36, 37.

(*b*) See 5 Cru. Dig. tit. 36, c. 7, § 27—29, 56, 57; Pres. Shep. T. (c) See § VII., *supra*, and 1 Prest. Conv. 20.

the Crown, or particular estates derived out of it, or Pt. III. T. 13,  
Ch. 3, s. 2. any other estate in the land (a). **2696.**

And in other cases where the reversion was vested in the Crown, except by a subject in fraud of alienation, it is doubtful, at least, whether such reversion could be barred (b). **2697.**

9. By the stat. 21 Hen. 8, c. 15, s. 14, no manner of 9. Statutes  
or elegits. statute staple, statute merchant, nor execution by elegit shall be avoided, or in any manner made frustrate, by a feigned recovery (c). **2698.**

10. A Court of Equity will interfere in the case of 10. Persons  
not barred  
in equity  
in certain  
cases. recoveries obtained by fraud (d). And it will also confine the operation of a recovery to those purposes for which the recovery was intended (e). **2699.**

As the effect of a recovery so materially depended on Tenant to  
the præcipe. there being a proper tenant to the præcipe, it may be desirable to add a few observations upon that point. **2700.**

We have seen that the rule was, that a person, in Rule as to  
him. order to be a proper tenant to the præcipe, must, at the time of the writ being brought against him, or before judgment given, have had the immediate estate of freehold, either by right or by wrong (f). **2701.**

But by the stat. 14 Geo. 2, c. 20, s. 6, a recovery was Enactments  
upon the  
point. valid to all intents and purposes, if the deed making the tenant to the præcipe were executed before the end of the term, great session, session or assize in which such recovery was suffered (g). **2702.**

(a) 5 Cru. Dig. tit. 36, c. 10, § 40, 49; Co. Litt. 372 b; 1 Prest. Conv. 18, 145.

(b) See 5 Cru. Dig. tit. 36, c. 10, § 45, 53—56; 1 Prest. Conv. 19, 146.

(c) 5 Cru. Dig. tit. 36, c. 10, § 57.

(d) 5 Cru. Dig. tit. 10, c. 36, § 44.

(e) Id. § 46.

(f) Pres. Shep. T. 42; 1 Prest. Conv. 48.

(g) 5 Cru. Dig. tit. 36, c. 2, § 24, 25.

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By s. 5 of the same statute, after a lapse of twenty years from the suffering a recovery, it is to be deemed valid, if it appear on the face of it that there was a tenant to the writ, and if the persons joining in such recovery had a sufficient estate and power to suffer the same, notwithstanding the deed for making the tenant to such writ be lost or not appear (a). **2703.**

And, in consequence of the same statute, a tenant in tail in remainder could suffer a recovery without the concurrence of the tenant of the first estate of freehold, if the latter were a mere lessee for life under a rent, provided the owner of the estate of freehold next expectant on such life estate conveyed an estate of freehold to the tenant to the writ (b). **2704.**

Recovery  
without a  
legal tenant  
to the  
præcipe.

A recovery suffered by a cestui que trust in tail who was in possession under the trustees, or by a cestui que trust in tail in remainder in conjunction with a cestui que trust for life in possession, would effectually bar such estate tail and all equitable remainders and equitable reversions, although there was only an equitable tenant to the præcipe. And a recovery suffered by an equitable tenant in tail who had previously mortgaged in fee is valid without the concurrence of the mortgagee, because the whole beneficial ownership, subject to the payment of the money, remains in the mortgagor (c). But a recovery without a legal tenant to the præcipe was no bar to any legal estate (d). It is enacted, however, by the stat. 3 & 4 Will. 4, c. 74, s. 11, that no recovery "shall be invalid in consequence of any person, in whom an estate at law was outstanding, having omitted to make the tenant to the writ of entry or other writ for suffering

(a) 5 Cru. Dig. tit. 36, c. 2, § 56. Turn. & Russ. 26.

(b) 5 Cru. Dig. tit. 36, c. 2, § 28;  
Pres. Shep. T. 42, n. (82); Burt.  
Comp. § 691.

(d) See 5 Cru. Dig. tit. 36, c. 8,  
§ 9—20; 1 Prest. Conv. 22—24;  
*Ireson v. Pearman*, 3 Bar. & Cress.

(c) *Nouaille v. Greenwood*, 1 799.

such recovery, provided the person who was the owner of or had power to dispose of an estate in possession, not being less than an estate for life or lives in the whole of the rents and profits of the lands in which such estate at law was outstanding, or the ultimate surplus of such rents and profits after payment of any charges thereout, and whether any surplus after payment of such charges shall actually remain or not, shall within the time limited for making the tenant to the writ for suffering such recovery, have conveyed or disposed of such estate in possession to the tenant to such writ; and an estate shall be deemed to be an estate in possession notwithstanding there shall be subsisting prior thereto any lease for lives or years, absolute or determinable, upon which a rent is reserved, or any term of years upon which no rent is reserved." **2705.**

Pr. III.T.13,  
CH. 3, s. 2.

Where a remainder in tail was vested in several persons, who joined with the tenant for life in making a tenant to the præcipe, and a recovery was suffered, in which some only of them were vouched, an estate of freehold co-extensive with the interests of the others or other of them, who were or was not vouched, remained in the tenant to the præcipe, and was sufficient to give validity to a subsequent recovery, in which such others or other of them were or was vouched (a). **2706.**

Freehold in the tenant to the præcipe, where some only of several remaindermen in tail were vouched.

If a person, having a remainder or reversion expectant on an estate for life in possession, was made tenant to the præcipe, such life estate, except it were a lease for life within the stat. 14 Geo. 2, c. 20 (par. 2702—4), ought to have been surrendered to the remainderman or reversioner before he became tenant to the præcipe. The Courts will presume a surrender of the life estate, where there are sufficient grounds for so doing; as where the possession has accompanied the recovery a long time, as

Surrender of a life estate to the remainderman, or reversioner,

(a) *Collyer v. Mason*, 2 B. & B. 685.

Pr. III. T. 13,  
Ch. 3, s. 2.

or convey-  
ance thereof  
to a third  
person.

for forty years; or where there are entries in an attorney's book of a surrender having been prepared and paid for. The most usual course, however, was for the prior estate for life to be conveyed to some third person, to make him tenant to the præcipe (a). 2707.

### SECTION III.

#### *The operation of Fines and the operation of Recoveries contrasted.*

Pr. III. T. 13,  
Ch. 3, s. 3.

Most of the points of resemblance and of difference between Fines and Recoveries, as regards their operation, may readily be collected from the preceding view of the modes in which they respectively operate. One or two of these differences, however, it would seem expedient particularly to notice. 2707a.

A recovery  
instantly  
destroyed  
the estates  
in re-  
mainder and  
reversion,  
but a fine  
did not.

At the same time as a recovery barred an entail, we have seen that it instantly destroyed the estates expectant thereon, and created a fee simple out of the estate tail, or at least a fee commensurate with the estate which at the time of granting the entail was vested in the donor (b), even though the tenant in tail declared no uses, or the uses declared were void (c). The effect of a fine was very different. While, if levied with proclamations, it instantaneously barred all the lineal heirs in tail of the cognizor, and all his collateral relations who were privy to him in blood and estate, it had no immediate effect on the subsequent estates, but, until the expiration of the five years within which the owners of such estates were allowed to claim, only converted the estate tail into a base fee, although after that time,

(a) Pres. Shep. T. 42, n. (82); 1 § 7; 2 Bl. Com. 361; 1 Prest. Conv. 77—85.      Prest. Conv. 1.

(b) See 5 Cru. Dig. tit. 36, c. 9,      (c) *Tanner v. Radford*, 6 Sim. 21.



indeed, in the event of non-claim, the estate tail became an estate in fee simple (a). **2708.**

Pr. III.T.13,  
Ch. 3, s. 3.

From this diversity of operation, there sometimes resulted some most important practical differences in the effect of the two assurances. **2709.** Thus—

1. If the immediate reversion or remainder in fee simple happened to be vested in the tenant in tail himself, and had descended from and was subject to an incumbrance of one of his ancestors, a recovery suffered by the tenant in tail cut off the incumbrance, by cutting off the reversion or remainder subject thereto. But if a fine was levied by him, it served to accelerate the incumbrance: for the base fee into which the estate tail was converted merged in the reversion or remainder in fee, so that such remainder or reversion became an estate in possession; and the incumbrance which was unavailing as against those who claimed under the entail before the fine, became, by the operation of the fine, accelerated together with the reversion or remainder, and established as an immediate charge upon those persons against whom it was before of no avail, that is, against the tenant in tail and the heirs in tail, under their new characters of tenant in fee simple and heirs general, which they acquired by the fine (b). **2710.**

1. A recovery would sometimes destroy an incumbrance which a fine would accelerate.

2. If a person seised in fee ex parte maternâ suffered a recovery, it did not alter the mode of descent (c). In the case of a tenant in tail by purchase under a marriage settlement made by his maternal ancestor, with the reversion in fee by descent ex parte maternâ, if the tenant in tail suffered a recovery to the use of himself in fee, the estate would descend to his heirs ex parte paternâ;

2. The indirect operation of a fine is sometimes different from that of a recovery, as regards the descent of an estate.

(a) See 5 Cru. Dig. tit. 35, c. 9; 1 Prest. Conv. 8; *Doe d. Gilbert v. Ross*, 7 Mees. & W. 125.

Conv. 9, 10, 13, 14; 2 Pres. Shep. T. 286; Watk. Conv. 3rd ed. by Prest. 64—5.

(b) See 5 Cru. Dig. tit. 35, c. 12, § 9, 10; tit. 36, c. 9, § 7; 1 Prest.

(c) 5 Cru. Dig. tit. 36, c. 9, § 12, 13.

PT. III.T.18,  
CH. 3, s. 8.

because the estate tail acquired by purchase, though from his maternal ancestor, would so descend; and the fee created by the recovery out of the estate tail descended in the same manner as the estate tail (*a*). Whereas, if a tenant in tail similarly situated had levied a fine, it is conceived that the property would have descended to his heirs *ex parte maternâ*; because the estate tail, which was alone originally descendible to his paternal heirs, would have been converted into a base fee, and that base fee would have merged in the reversion in fee simple descendible to his maternal heirs. **2711.**

(*a*) See 5 Cru. Dig. tit. 36, c. 9, § 14, 15; 1 Prest Conv. 197.

## TITLE XIV.

OF ALIENATION OF COPYHOLDS BY VOLUNTARY GRANT  
AND ADMITTANCE, BY SURRENDER AND ADMITTANCE,  
BY BARGAIN AND SALE AND ADMITTANCE, OR BY  
RECOVERY.

ALIENATION of copyholds may be either by the lord of the manor, or by one tenant of the manor to another. We have already made some few observations upon alienation by the lord by way of voluntary grant (*a*).  
**2712.**

PART III.  
TITLE XIV.

Alienation  
by the lord  
or a tenant.

With regard to alienation by one tenant to another, no ordinary assurance applicable to property of freehold tenure has any operation upon the legal estate in copyholds (*b*). The ordinary mode of alienation of a copyhold by a tenant having an estate in fee simple is by surrender and admittance, that is, a surrender or yielding up of his estate by the tenant to the lord or his steward, to the use of the alienee, or for such purposes as in the surrender are expressed; and an admittance of the alienee or person intended to take, to hold to him and his heirs at the will of the lord, according to the custom of the manor. The surrender and admittance are entered on the court roll, and the new tenant receives a copy of this entry (*c*). Before admittance, it was necessary, until a recent enactment, that the surrender should be presented by the homage or jury, by way of giving the lord notice of the surrender, unless he chose to proceed with-

Ordinary  
mode of  
alienating  
copyholds

when held  
in fee sim-  
ple.

Surrender  
and admit-  
tance.

(*a*) Supra, par. 304—8.

(*c*) Burton, § 1263; 2 Bl. Com.

(*b*) 2 Bl. Com. 367; 1 Cruise T. 365; 1 Cruise T. 10, c. 3, § 17.

10, c. 3, § 17.

PART III.  
TITLE XIV.

out it. But by the stat. 4 & 5 Vict. c. 35, s. 90, presentment is no longer necessary. **2713.**

Bargain  
and sale.Power of  
sale.

We have seen (par. 297—8) that in the case of free copyholds, a deed of bargain and sale is sometimes employed, instead of a surrender. And sometimes, to avoid the necessity for admittance of trustees for sale of copyholds under a will, a mere power of sale is given them without any estate, and they then execute a deed of bargain and sale in favour of the purchaser, which gives him the right of claiming admittance from the lord (*a*). **2714.**

Entry on  
court rolls,  
of deeds,  
and admit-  
tances under  
Stat. 45 & 46  
Vict. c. 38.  
The Settled  
Land Act,  
1882.

[With reference to deeds executed by tenants for life under stat. 45 & 46 Vict. c. 38, s. 20 (Appendix), it is provided by that section as follows:—“(3) In case of a deed relating to copyhold or customary land, it is sufficient that the deed be entered on the court rolls of the manor, and the steward is hereby required, on production to him of the deed, to make the proper entry; and on that production, and on payment of customary fines, fees, and other dues or payments, any person whose title under the deed requires to be perfected by admittance shall be admitted accordingly; but if the steward so requires, there shall also be produced to him so much of the settlement as may be necessary to show the title of the person executing the deed; and the same may, if the steward thinks fit, be also entered on the court rolls.”] **2714a.**

## Release.

Where a man has only a right to a copyhold, he may release it by deed or by copy to one who is admitted (*b*). **2715.**

Modes of  
barring  
entails.

Estates tail in copyholds are not capable of being discontinued; nor could any assurance be made of them similar to a fine: but in all cases previous to the stat.

(*a*) See 9 Jarm. & Byth. by Sweet,  
424.

(*b*) Co. Litt. 59 a.

3 & 4 Will. 4, c. 74 (which, as we have seen, abolished recoveries and substituted other modes of disposition by tenants in tail and owners of base fees in copyholds) (*a*), such estates might be enlarged into fees simple, either by some appropriate proceeding in the lord's court (which was most commonly analogous to a common recovery, and called by that name), or, in the absence of a custom for that purpose, by a mere surrender (*b*). **2716.**

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TITLE XIV.

By the stat. 3 & 4 Will. 4, c. 74, s. 4, no fine or recovery levied or suffered in a superior Court of lands of the tenure of ancient demesne may be reversed as to any person except the lord of the manor; and every such fine or recovery which may be reversed as to him will still remain valid against and as binding upon the conusors or vouchees, and all persons claiming under them, as if not reversed. **2717.**

Fine or  
recovery of  
lands in  
ancient  
demesne.

By s. 5 of the same Act, if a fine or recovery has been levied or suffered in a superior Court of lands of the tenure of ancient demesne, and subsequently a fine or recovery has been levied or suffered of the same land in the court of the lord of the manor, the fine or recovery in the lord's court will be as valid as if the tenure had not been altered. **2718.**

By s. 6 of the same statute, tenure of ancient demesne, where suspended or destroyed by levying or suffering a fine or recovery in a superior Court, will be restored where the lord is not barred of his right to reverse such fine or recovery, provided his rights shall have been recognised within twenty years from the 1st of January, 1834. **2719.**

By the general custom, every copyholder may surrender in court, or he may surrender out of court to the lord himself or his steward. But he cannot surrender

Mode of  
surrender

(*a*) See *supra*, par. 2209 et seq.

37, c. 2, § 7. 19; Co. Litt. 60 a, b,

(*b*) Burton, § 1285; 5 Cruise T.

& n. 3, 1.

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TITLE XIV.

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out of court to the lord by the hands of any other person, except by particular custom (a). 2720.

Where  
grants and  
admittances  
may be  
made.

By the old law, grants and admittances must generally have been made at a court held within the manor. But by particular custom, the court might be held out of the manor, and grants and admittances made there (b). And by the stat. 4 & 5 Vict. c. 35, s. 87, it is enacted "that, after the 31st day of December, 1841, it shall be lawful for the lord of any manor, or his steward, or the deputy of such steward, to grant at any time and at any place, either within or out of such manor, and without holding a court for such manor, any lands, parcel of such manor, to be held by copy of court roll, or according to the custom of the said manor, which such lord shall for the time being be authorised or empowered to grant out to be held by copy of court roll, or according to such custom, so nevertheless that such lands be granted for such estate only, and to such person only, as such lord, steward, or deputy shall for the time being be authorised or empowered to grant the same." And by s. 88, it is enacted, "that, after the 31st day of December, 1841, it shall be lawful for the lord of any manor, or his steward, or the deputy of such steward, to admit, at any time, and at any place, either within or out of such manor, and without holding a court for such manor, any person as tenant to any lands, parcel of such manor, to be held by copy of court roll, or according to the custom of such manor, to and for which such person shall for the time being be entitled to be admitted." But by s. 91, it is provided, "that where by the custom of any manor the lord of such manor is authorised, with the consent of the homage of such manor, to grant any common or waste lands of such manor to be holden of the lord by copy of court roll, nothing in this Act contained shall operate to

(a) Co. Litt. 59 a, & n. 6.

(b) 1 Cruise T. 10, c. 1, § 22.

authorize or empower the lord to grant any such common or waste lands without the consent of the homage assembled at a customary court holden for such manor, etc." **2721.**

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Prior to this Act, an admittance by the steward, as such, out of the manor, whether at a court or otherwise, was inoperative, unless by virtue of a special authority from the lord, or unless subsequently ratified by him and notified to the homage (a). **2722.**

By the stat. 11 Geo. 4 & 1 Will. 4, c. 65, s. 3—5, infants, femmes covert, and lunatics may be admitted to copyhold estates by their guardian, committee, or attorney. By s. 6, if the fines are not paid, the lord may enter and receive the profits of the copyhold till he is satisfied. By s. 8, guardians, or husbands, or committees paying fines, may reimburse themselves out of the rents of the copyhold. And by s. 9, no forfeiture is to be incurred by an infant for not appearing or for refusing to pay fines. But the stat. 16 & 17 Vict. c. 70, repeals this Act, as regards lunatics, and makes certain enactments on the subject (b). **2723.**

Admittance  
of persons  
under  
disability.

The words of limitation in the surrender must be the same as those which would be required in the conveyance of freehold lands, unless the peculiar custom authorises a variation. And the surrender is generally to be construed in the same manner as a conveyance at common law (c). **2724.**

Words of  
limitation  
in a  
surrender,  
and con-  
struction  
thereof.

Admittance may take place, first, upon a voluntary grant from the lord. Secondly, upon a surrender or devise by the former tenant. And, thirdly, upon a descent (d). **2725.**

Circum-  
stances  
under which  
admittances  
may take  
place.

If a person marries a woman who has a term of years Husband

(a) *Doed. Gutteridge v. Somerby*,  
7 Com. B. (N. S.) 599.

(b) See Pt. IV. T. 1, Ch. 6.

(c) *Burton*, § 1278 ; 5 Cruise T.  
37, c. 1, § 76, 84, 85.

(d) 2 Bl. Com. 370.

PART III.  
TITLE XIV.not ad-  
mitted

or other greater estate in a copyhold, though he thereby becomes seised or possessed of the copyhold, yet as it is *jure alieno*, he is not obliged to be admitted, and therefore not liable to a fine (*a*). **2726.**

Rights of  
surrenderee  
before  
admittance.

After surrender, and before admittance of the surrenderee, the surrenderor remains tenant to the lord; and if the surrenderee surrenders to another, the surrender is void, and cannot be confirmed. But the surrenderee is so far regarded as owner, that the surrenderor cannot revoke the surrender, or convey away, or incumber; and the surrenderee may make an equitable, though not a legal, transfer by act *inter vivos*; and if the surrenderee, in the case of a free copyhold, dies before admittance, his widow is entitled to dower (*b*). Before the stat. 1 Vict. c. 26, s. 3, a surrenderee before admittance could not devise (*c*). **2727.**

Rights of  
heir or  
devisee  
before  
admittance.

The heir has as complete a title without admittance, as with it, against all the world (*d*), except the lord. Indeed, upon satisfying the lord for his fine due upon the descent, he may surrender into the hands of the lord to whatever use he pleases (*e*). And even before the stat. 1 Vict. c. 26, s. 3, an heir at law might devise a copyhold estate descended to him, without having been admitted, and without previous payment of the lord's fine (*f*). But, until admittance, a devisee cannot surrender the tenement, nor before the stat. 1 Vict. c. 26, s. 3, could he devise it (*g*). **2728.**

The effect of the stat. 1 Vict. c. 26, s. 3, is to enable the devisee to devise without any surrender to the use of his will: it does not divest the estate out of the cus-

(*a*) 1 Cruise T. 10, c. 4, § 19.(*b*) See 5 Cruise T. 37, c. 1, § 53—59; 2 Bl. Com. 368; Coote Mortg. 3rd ed. 114.(*c*) 1 Jarm. Wills, 2nd ed. 48.(*d*) 2 Bl. Com. 371, Christian's note.(*e*) 2 Bl. Com. 371; Burton, § 1295.(*f*) *Right d. Taylor v. Banks*, 3 B. & Ad. 664; Burton, § 1295; 1 Jarm. Wills, 2nd ed. 47.(*g*) Burton, § 1294; 1 Jarm. Wills, 2nd ed. 47.



tomary heir, and vest it in the devisee: until the admittance of the devisee, the estate remains in the customary heir: and hence where the devisee refuses to be admitted, the lord cannot seise quousque for want of a tenant (a). **2729.**

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The uses expressed in the surrender entirely govern the operation of the subsequent admittance. If any other person than he to whose use the surrender was made is admitted by the lord, he acquires no title; and if, on the admittance of the surrenderee, other words of limitation are used than those in the surrender, they are of no avail, and the estate expressed in the surrender takes effect (b). **2730.**

Admittance  
governed by  
uses of  
surrender.

By the general custom, admittance of a tenant for life is that of the remaindermen, so as to vest the estate in them (c). **2731.**

Admittance  
of remain-  
dermen.

The admittance of one joint tenant is the admittance of all his co-tenants (d). **2732.**

Admittance  
of one joint  
tenant.

The title of the tenant upon admittance relates back to the surrender (e). **2733.**

Admittance  
relates back.

In admittances upon surrender or upon descent, the lord is to no intent reputed as owner, but as a mere instrument. As no manner of interest passes into him by the surrender or the death of his tenant, so no interest passes out of him by the admittance. It is a merely ministerial act, and therefore it is immaterial whether the lord's estate in the manor is in fee or for years, or whether his possession is by right or wrong (f). And à fortiori the regularity of the steward's appointment is not material (g). **2734.**

Lord and  
steward are  
mere instru-  
ments in  
admittances  
on surren-  
der or de-  
scend.

(a) *Garland v. Mead*, L. R. 6 Q. B. 441.

(b) *Burton*, § 1276.

(c) *Smith v. Glasscock*, 4 Com. B. 357.

(d) *Bence v. Gilpin*, L. R. 3 Ex.

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76, 81, 84.

(e) *Bence v. Gilpin*, L. R. 3 Ex. 76, 83, 84.

(f) 2 Bl. Com. 370—1; *Burton*, § 1277; Co. Litt. 58 b, 59 b.

(g) *Burton*, § 1277.

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TITLE XIV.Fines, when  
due.

A sum of money, called a fine, is due to the lord on an admittance, whether upon descent, or upon a surrender or a devise by a former tenant, or upon a voluntary grant (*a*). On the admittance of joint tenants, the fine is not a single fine, but is increased by the number of the co-tenants (*b*). And if a person entitled to copyholds in fee dies without having been admitted, two fines are payable on the admission of his devisee (*c*). Where a man acquires a copyhold by the custom of curtesy, or a woman acquires a copyhold by the custom of freebench, a fine is payable in some manors on the admittance of these tenants, and in others not (*d*). As by the general custom of copyholds, the admittance of a tenant for life is an admittance of the persons in remainder, so the fine is not assessed for the particular estate alone, but for the whole inheritance. In some manors, however, by particular custom, persons in remainder must be admitted, and pay a fine on their admittance (*e*). And where this custom exists, the same rule ought to be applied to an executory devisee who becomes entitled on the defeasance of an estate in fee (*f*). A fine being only due as a consideration for the admittance of a new tenant, if a copyholder surrenders for life, reserving the reversion to himself, and the tenant for life dies, the surrenderor may enter without paying a fine because the reversion was never out of him. So if a copyholder grants his estate to a stranger upon condition, and afterwards enters for the condition broken, he is not liable to the payment of a fine; because he comes in of his old estate (*g*). And where a testator

(*a*) 1 Cruise T. 10, c. 4, § 1, 2, 3.(*b*) *Bence v. Gilpin*, L.R. 3 Ex. 76.(*c*) *Lord Londesborough v. Foster*,  
3 Best & Sm. 805.(*d*) 1 Cruise T. 10, c. 4, § 4.(*e*) 1 Cruise T. 10, c. 4, § 10, 13;1 Scriven on Copyh. 4th ed. by  
Stalman, 294—5, 342—3.(*f*) *Randfield v. Randfield*, 3 De  
G. F. & J. 766.(*g*) 1 Cruise T. 10, c. 4, § 15.

directs certain persons to sell his copyholds, they need not be admitted, and consequently they are not liable to the payment of a fine (*a*). And where a copyhold is devised to trustees for a term, and subject thereto to a person in fee, and he is admitted, and pays the full fine which would be due from a tenant in possession in fee, the lord has both a tenant on the roll and a full fine, and therefore cannot force the trustees to come in and be admitted, and pay a fine (*b*). **2735.**

A fine is due on the change of the lord by the act of God, but not by his own act (*c*). **2736.**

The lord may not take more than two years' improved annual value, in the case of a fine arbitrary (*d*), except upon a voluntary grant (*e*). The value is not estimated by the rent under a lease; and a deduction is made on account of quit rents, but not on account of land tax (*f*). In some manors the fine for two lives taking successively is as much and half as much as the fine for one life; and the fine for three lives as much and half as much as the fine for two lives (*g*). **2737.**

In many manors, upon the death of a copyholder, even though he was only tenant for life, the lord becomes entitled to his best beast or best chattel, whether consisting of a jewel or piece of plate or anything else, or to some pecuniary composition in lieu thereof (*h*). A heriot is only due on the death of a legal tenant, not on the death of the person entitled to an equitable estate in a copyhold (*i*). No heriot is due on the death of a married woman if she have no legal estate in the chattels (*j*).

(*a*) 1 Cruise T. 10, c. 4, § 21.  
 (*b*) *Everingham v. Ivatt*, L. R. 8 Q. B. (Ex. Ch.) 388.  
 (*c*) Co. Litt. 59 b.  
 (*d*) 1 Cruise T. 10, c. 4, § 32, 36.  
 (*e*) See 1 Cruise T. 10, c. 4, § 38.  
 (*f*) 1 Cruise T. 10, c. 4, § 36.

(*g*) 1 Cruise T. 10, c. 4, § 34.  
 (*h*) 1 Cruise T. 10, c. 4, § 45; 2 Bl. Com. 422—424.  
 (*i*) 1 Cruise T. 10, c. 4, § 49.  
 (*j*) 1 Cruise T. 10, c. 4, § 51; 2 Bl. Com. 424.

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TITLE XIV.**

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Where a copyhold estate is divided into two parts by a devise of it to two persons, as tenants in common, each of the devisees is subject to the payment of a separate fine, and to a several heriot (*a*). **2738.**

**Services.**

Suit of court is a service to which all copyholders are bound. But in many manors copyholders are also liable, by particular custom, to the payment of rent service, rents of assize and reliefs, and to the performance of a variety of services (*b*). **2739.**

(*a*) 1 Cruise T. 10, c. 4, § 55.

(*b*) 1 Cruise T. 10, c. 3, § 2.

## TITLE XV.

### OF ALIENATION BY WILL.

#### CHAPTER I.

#### OF WILLS GENERALLY, AND OF DEVISES AND BEQUESTS JOINTLY CONSIDERED.

##### SECTION I.

##### *Of Wills Generally.*

A WILL is a disposition of property which is not to take effect in any manner, either inchoately or absolutely, before the death of the testator, that is, the person whose property is so disposed of, but is to take effect on or after that event. So far as a will relates to personal estate, it is sometimes termed a "testament," and sometimes a "last will and testament" (a). Pr. III. T. 15, CH. 1, s. 1. Definition of a will.

**2740.**

A codicil is a supplement which is made to a will, for the purpose of altering, explaining, adding to, or subtracting from the dispositions made by the will (b). Definition of a codicil.

**2741.**

A donatio mortis causa bears a resemblance to a testamentary disposition, but yet materially differs from it. This kind of donation is a gift of personal property, made by one who apprehends that he is in peril of death, and evidenced by a manual delivery by Donatio mortis causa.

(a) Co. Litt. 111 a.

(b) 2 Bl. Com. 500 ; 6 Cruise T. 38, c. 1, § 13. As to codicils, see

Hayes & Jarm. Concise Forms of Wills, 6th ed., by Mr. T. S. Badger-Eastwood, pp. 444—8.

PT. III.T.15,  
CH. 1, s. 1.

him or by another person in his lifetime by his direction, to the donee or some one else for the donee, of the property itself, or of the means of obtaining possession of the same, or of the writings by which the ownership thereof was created, and conditioned to take effect absolutely in the event of his not recovering from his existing disorder, and not revoking the gift before his death (*a*). Such a donation partakes partly of the characteristics of a gift inter vivos, and partly of those of a legacy. It differs from a legacy in these respects: 1. It takes effect sub modo from the delivery in the lifetime of the donor; and therefore it cannot be proved as a testamentary act in the proper Court. 2. It requires no assent or other act on the part of the executor or administrator to perfect the title of the donee. It differs from a gift inter vivos in certain respects in which it resembles a legacy: 1. It is revocable during the donor's lifetime. 2. It may be made to the wife of the donor. 3. It is liable to the debts of the donor on a deficiency of assets (*b*). **2742.**

An appointment by will has the properties of a devise.

Although a will made in execution of a power does not derive its effect from the Statute of Wills, but from the deed of uses by which the power is created, and a will made under these circumstances is in fact an appointment of a use; yet, being made through the medium of a devise, it has all the essential properties of a will. Thus a will made in execution of a power is revocable; the appointee must survive the appointor, in order that the appointment may have any effect; an appointee in fee simple, if heir at law, was, by the old law, in by descent, not by purchase; and a will made in execution of a power is construed in the same manner as a proper will (*c*). **2743.**

(*a*) See Story's Eq. Jur. § 606, 607 a, 607 c; 1 Spence's Eq. Jur. 196; 2 Spence's Eq. Jur. 912; *Powell v. Hellicar*, 26 Beav. 261.

(*b*) Story's Eq. Jur. § 606 a; 1 Spence's Eq. Jur. 196.

(*c*) 4 Cruise T. 32, c. 16, § 24 —6.

All adults who have a power of disposing of their real or personal estate by any conveyance inter vivos, may dispose of them by will (*a*). Persons born deaf, blind, and dumb, as having always wanted the common inlets of understanding, are incapable of making a will. Such as have their senses besotted with drunkenness are also incapable of making a will, by reason of mental disability (*b*). And persons under such circumstances of duress that they cannot be supposed to have been free agents, are incapable of making a will (*c*). Of the disabilities arising from unsoundness of mind, infancy, and coverture, we shall have occasion to speak in the Fourth Part of this Compendium (*d*). But it may be here observed, that where a testator is under any disability at the time when the will is made, it does not become valid by the removal of the disability before his death; for the party must be capable of making a will, at the time when the will is executed (*e*). **2744.**

Pt. III. T. 15,  
Ch. 1, s. 1.

Who may  
make a will.

Equity will rectify a clear mistake or omission in a will, if it is apparent on the face of the will, but not otherwise (*f*), except in certain cases of mistake in the name or description of a devisee or legatee (*g*). **2745.**

Where  
mistakes  
will be rec-  
tified by the  
Court.

Where a testator by his will gave a legacy, and by a codicil, after reciting that he had advanced the legatee a certain specified sum, directed that sum to be considered as a payment on account of the legacy, it was held that the sum specified in the codicil ought to be

(*a*) 6 Cruise T. 38, c. 2, § 1; 1 Wms. Exors. 4th ed. 11. As to competency to make a will, and undue influence, see Hayes & Jarm. Concise Forms of Wills, 6th ed., by Mr. T. S. Badger-Eastwood, pp. 83—87.

(*b*) 2 Bl. Com. 497; 1 Jarm. Wills, 2nd ed. 26.

(*c*) 2 Bl. Com. 497.

(*d*) As to criminals, see *supra*,

par. 1515—1528.

(*e*) 6 Cruise T. 38, c. 2, § 10; 1 Jarm. Wills, 2nd ed. 31.

(*f*) Story's Eq. Jur. § 179, 180, 181; 1 Jarm. Wills, 2nd ed. 337—340; *Parker v. Tootall*, 11 H. L. Cas. 143; *In re Daniel's Settlement Trusts*, L. R. 1 Ch. D. (Ap.) 375; *Re Redfern, Redfern v. Bryning*, L. R. 6 Ch. D. 133.

(*g*) See *infra*, Sect. VI. § 1.

deducted from the legacy, though the sum actually advanced was less than the sum specified (a). **2745a.**

PT. III.T.15,  
CH. 1, s. 1.

It is essential to the validity of a will, that at the time of its execution the testator should know and approve of its contents (b). **2746.**

## SECTION II.

### *Of the Requisite Forms in Devises and Bequests.*

#### 1. *Of the Law as to the Requisite Forms before the Stat. 1 Vict. c. 26.*

PT. III.T.15,  
CH. 1, s. 2.

Testaments  
either  
written or  
verbal.

Testaments are divided into two sorts: written, and verbal or nuncupative; of which the former is committed to writing in the first instance, while the latter depends in the first instance merely upon oral evidence, and was laid, by the Statute of Frauds, 29 Car. 2, c. 3, under many restrictions, except when made by mariners at sea and soldiers in actual service (c). **2747.**

Requisites  
to a devise  
under the  
Statute of  
Frauds

By the 5th section of that statute, it is enacted, "That all devises and bequests of any lands or tenements, devisable either by force of the Statute of Wills, or by this statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect" (d). **2748.**

In consequence of this statute, the following circumstances are absolutely necessary to the validity of a

- (a) *In re Aird's Estate*, Aird v. 1 Prob. & M. 64.  
Quick, L. R. 12 Ch. D. 291. (c) 2 Bl. Com. 500.  
(b) *Hastilow v. Stobie*, L. R. (d) Burton, § 260.



devise of hereditaments of freehold tenure made before the year 1838: 1. That it be written. 2. That it be signed by the party himself or by some other in his presence or by his express directions. 3. That it be attested by three or four witnesses in the presence of the testator (*a*). But it was held that copyholds were not within the Statute of Frauds, but that they might be devised by any instrument which was adequate to the testamentary disposition of personal estate (*b*). **2749.**

Pr. III. T. 15,  
Ch. 1, s. 2.

Except in the case of a bequest of stock in the public funds, which was required by certain statutes to be attested by two witnesses, a testament of chattels is good, by the old law, if proved to be written in the testator's own hand, though without his name or seal to it, and without any witnesses present at its publication. And though written in another man's hand, and never signed by the testator, yet if proved to be according to his instructions, and approved by him, it is a good will of personal estate (*c*). **2750.**

Requisites  
by the old  
law in the  
case of  
wills of  
personalty.

Where a will is written on several sheets of paper, the proper practice is to sign each page. If the will was contained in one sheet of paper, it was sufficient by the old law if the testator's name were written by himself in any part of it (*d*). **2751.**

Further  
remarks as  
to signing.

By the old law, it was necessary that a devise should be published, that is, the deviser must have done some act from which it could be concluded that he intended the instrument to operate as a will or devise. If, however, he executed the will, and the words "signed and published by him as and for his last will and testa-

Remarks as  
to publica-  
tion.

(*a*) 6 Cruise T. 38, c. 5, § 2; 2 Bl. Com. 376.

(*b*) 1 Jarm. Wills, 2nd ed. 83; and see *infra*, Ch. 2, s. 3.

(*c*) 2 Bl. Com. 501; 1 Jarm. Wills, 2nd ed. 82, 83.

(*d*) 6 Cruise T. 38, c. 5, § 7, 9; 1 Jarm. Wills, 2nd ed. 66. It is marvellous that it should ever have been sufficient merely to sign the *last* page. Such a practice opens a wide door to fraud.

PT. III. T. 15,  
CH. 1, R. 2.

ment" occurred, that was a sufficient publication (a).

And even an attestation of the testator's having signed, or signed and sealed the will, without the mention of publication, is sufficient evidence of publication (b). And publication was not necessary in the case of personal estate (c). **2752.**

Further  
remarks as  
to attesta-  
tion.

Where the testator owns his handwriting before the witnesses, it is sufficient, though they do not see him sign his name (d). An attestation, even of a devise, by the witnesses setting their marks to the will, is good within the Statute of Frauds (e). It is not necessary to the validity of the execution of a will even of lands by a blind man, that it should be read over to him in the presence of the attesting witnesses (f). And although the witnesses attested at different times it was sufficient (g). **2753.**

An infamous person (such as a person convicted of sheep-stealing) is not a competent witness (h). And formerly a devisee, legatee, or creditor was not a competent witness to a devise. This occasioned the stat. 25 Geo. 2, c. 6. By s. 1, "if any person shall attest the execution of any will or codicil which shall be made after the 24th day of June, 1752, to whom any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate, other than and except charges on lands, tenements, or hereditaments for payment of any debt or debts, shall be thereby given or made, such devise, legacy, estate, interest, gift or appointment, shall, so far only as concerns such person

(a) 6 Cruise T. 38, c. 5, § 50, 51.

(b) *Mackinley v. Sison*, 8 Sim 561; *Bartholomew v. Harris*, 15 Sim. 78; *Vincent v. Bishop of Sodor and Man*, 4 De G. & S. 294.

(c) 1 Wms. Exors. 4th ed. 71.

(d) 6 Cruise T. 38, c. 5, § 15.

(e) 6 Cruise T. 38, c. 5, § 19;

Sugd. Concise View, 284; 1 Jarm. Wills, 2nd ed. 69.

(f) 6 Cruise T. 38, c. 5, § 20; 3 Jarm. & Byth. by Sweet, 21; 1 Jarm. Wills, 2nd ed. 26.

(g) 6 Cruise T. 38, c. 5, § 32.

(h) 6 Cruise T. 38, c. 5, § 48.

attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void and such person shall be admitted as a witness to the execution of such will or codicil, within the intent of the said Act, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will or codicil." And by s. 2, "in case, by any will or codicil already made or hereafter to be made, any lands, tenements, or hereditaments, are or shall be charged with any debt or debts, and any creditor whose debt is so charged hath attested or shall attest the execution of such will or codicil, every such creditor, notwithstanding such charge, shall be admitted as a witness to the execution of such will or codicil, within the intent of the said Act" (a). **2754.**

This statute does not extend to wills of personal estate only, the preamble relating only to real estate; and a legacy to a person who is an attesting witness to such a will is not void (b). And the Act does not extend to a devise of real property to the wife of one of the witnesses. So that, in such a case, the husband is not a credible witness (c). **2755.**

A person cannot empower himself to give lands by a will not duly attested (d). All devises by which terms for years or other interests arising out of lands are created, or by which powers to sell or charge lands are given, are within the Statute of Frauds. If, however, a will duly executed contains a general charge of legacies on the testator's lands, such charge will extend to legacies given by a subsequent will or codicil not duly attested. But if a person by will duly attested, charges his real estate with such legacies and annuities as he

(a) 6 Cruise T. 38, c. 5. § 44, 436; *Foster v. Banbury*, 3 Sim. 40.  
45. (c) Burton, § 265.

(b) *Emanuel v. Constable*, 3 Russ.

(d) 6 Cruise T. 38, c. 5, § 53.

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shall afterwards give and charge upon that estate by will, whether attested or not, a charge by an unattested codicil will not be good (a). **2756.**

Terms for years already created were disposable by testament before the Statute of Wills, and they are not comprehended within the Statute of Frauds, and might therefore be disposed of by any kind of will or testamentary disposition, unless they became attendant on the inheritance, when they were considered as part of the inheritance, and not as chattels real, and could only be disposed of by such a will as would pass the inheritance (b). **2757.**

Will in the  
form of an  
instrument  
inter vivos.

An instrument may operate as a will, though it be in the form of a deed or some other than a testamentary form, especially where it cannot operate in the form intended, or where it contains a power of revocation. But if, in order to give full effect to an instrument, it must be considered as an act inter vivos, it is generally not testamentary, especially if there is no power of revocation (c). Yet an instrument may operate as a will, though it be only partially testamentary (d). **2758.**

Registration  
of wills in  
Yorkshire  
and Middle-  
sex.

By the stats. 2 & 3 Anne c. 4, and 6 Anne c. 35, relating to the West Riding of Yorkshire, by the latter statute relating to the East Riding, by the stat. 8 Geo. 2, c. 6, relating to the North Riding, and by the stat. 7 Anne c. 20, relating to the county of Middlesex, wills are made void against a subsequent purchaser, unless a memorial be registered as directed by those statutes (e). **2759.**

(a) 6 Cruise T. 38, c. 5, § 55, 56, 59; 1 Rep. Leg. by White, 685; 1 Jarm. Wills, 2nd ed. 78, 79.

(b) 6 Cruise T. 38, c. 5, § 72, 74.

(c) *Att.-Gen. v. Jones*, 3 Price 368; *Tompson v. Browne*, 3 My. & K. 32; *Fletcher v. Fletcher*, 4 Hare 79; *In the goods of Morgan*, L. R. 1 Prob. & M. 219; 9 Jarm. & Byth.

2nd ed. 508—524; 1 Sugd. Pow. 261 n.; 1 Jarm. Wills, 2nd ed. 12, 17, 18, 19.

(d) *Doe d. Cross v. Cross*, 8 Ad. & E. (N. S.) 714.

(e) 6 Cruise T. 38, c. 1, § 28—32; Sugd. Concise View, 577; *Chadwick v. Turner*, 34 Beav. 634.

But by the stat. 37 & 38 Vict. c. 78, s. 8, "where the will of a testator devising land in Middlesex or Yorkshire has not been registered within the period allowed by law in that behalf, an assurance of such land to a purchaser or mortgagee by the devisee or by some one deriving title under him, shall, if registered before, take precedence of and prevail over any assurance from the testator's heir at law." **2760.**

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Non-regis-  
tration of  
will in  
Middlesex,  
etc., cured  
in certain  
cases.

Wills devising lands or tenements in the city and liberties of London, duly executed and attested, may be enrolled either in the Hustings of Pleas of Land or Common Pleas; the same being first proved in open Court, on the oaths of two of the subscribing witnesses thereto, and proclaimed at one of these Courts (a). **2761.**

Enrolment  
of wills in  
the City of  
London.

A will of personalty, including terms for years and other chattels real, must have been proved in the proper Ecclesiastical Court: otherwise its existence could not be recognized in any Court. But a will of realty alone need not have been proved; and so far as a will relates to realty, probate of it in the Ecclesiastical Court was of no avail. But by the stat. 20 & 21 Vict. c. 77, ss. 61—64, wills are proved in the Court of Probate [now the Probate, Divorce, and Admiralty Division of the High Court of Justice]; and such proof is conclusive evidence of the validity and contents of a will of realty (b). Where, however, a will is limited to the disposition of real property only, it is not entitled to probate, although it contains the appointment of an executor, with directions to convert the real into personal estate (c). **2762.**

Probate.

No relief will be afforded to the legatees or devisees under a will defectively executed (d). Being volunteers,

No relief  
against  
defective

(a) 1 Jarm. & Byth. by Sweet, 263.

(b) 1 Wms. Exors. 5th ed. 34, 21 ; 2 Steph. Com. 202—5.

(c) *In the goods of Jane Barden*, L. R. 1 Prob. & M. 325.

(d) See Story's Eq. Jur. § 105 a, 106.

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execution  
of a will.

they are deemed to have as little equity as the heir or next of kin, or even less, as it is a maxim that *fortior et æquior est dispositio legis, quam hominis* (a); and therefore the legal right which has vested in the latter will not be taken away; for the maxim is, that where the equity is equal, the law must prevail. 2763.

II. *Of the Alterations as to the Requisite Forms made by the stat. 1 Vict. c. 26 (b); and of the Provisions of the stat. 15 Vict. c. 24, and the stat. 24 & 25 Vict. c. 114.*

Signature.

By the stat. 1 Vict. c. 26, s. 9, "no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say,) it shall be signed at the foot or end thereof by the testator, or by some

Attestation.

other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator, in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary." But by s. 11, it is provided, "that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act." And by s. 12, it is further enacted, that this Act shall not prejudice or affect any of the provisions contained in the stat. 11 Geo. 4 & 1 Will. 4, c. 20, "respecting the wills of petty officers and seamen

Exceptions  
in the case  
of soldiers  
and sailors.

(a) Co. Litt. 338 a.

(b) By 1 Vict. c. 26, s. 34, it is enacted, "That this Act shall not extend to any will made before the 1st day of January, 1838, and that every will re-executed or re-published or revived by any codicil, shall, for the purposes of this Act, be deemed to have been made at the time at which the same shall be so re-executed, re-published, or

revived; and that this Act shall not extend to any estate *pour autre vie* of any person who shall die before the 1st day of January, 1838." For decisions on this Act, see Hayes and Jarm. Concise Forms of Wills, 6th edition, by the late Mr. T. S. Badger-Eastwood, the learned Reader on the Law of Real Property to the Inns of Court.

in the Royal Navy, and non-commissioned officers of Pt. III. T. 15,  
CH. 1, s. 2. marines, and marines, so far as relates to their wages, pay, prize money, bounty money, and allowances, or other moneys payable in respect of services in Her Majesty's Navy." 2764.

The eleventh section, as regards soldiers, is confined to those who are on an expedition. On the other hand, as regards sailors, it extends to those who are on an expedition, though not at sea at the time. It applies even to sailors in the Merchant Service, though they be superiors of a ship (a). 2765.

By the stat. 15 Vict. c. 24, s. 1, the following enactment is made: "Where by the statute 1 Vict. c. 26, it is enacted, that no will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction; every will shall, so far only as regards the position of the signature of the testator or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this Act, if the signature shall be so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will, and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation, or shall follow or be after or under

Stat. 15 Vict.  
c. 24.

When signature to a will shall be deemed valid.

(a) Shelf. Real Prop. Acts, 6th ed. 490. See stat. 28 & 29 Vict. c. 72, entitled "An Act to make

better provision respecting wills of seamen and marines of the Royal Navy and Marines."

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the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature ; and the enumeration of the above circumstances shall not restrict the generality of the above enactment ; but no signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made." And by s. 2, it is enacted, "that the provisions of this Act shall extend and be applied to every will already made, where administration or probate has not already been granted or ordered by a Court of competent jurisdiction in consequence of the defective execution of such will, or where the property, not being within the jurisdiction of the Ecclesiastical Courts, has not been possessed or enjoyed by some person or persons claiming to be entitled thereto in consequence of the defective execution of such will, or the right thereto shall not have been decided to be in some other person or persons than the persons claiming under the will, by a Court of competent jurisdiction, in consequence of the defective execution of such will." By s. 3, "the word ' will ' shall in the construction of this Act be interpreted in like manner as the same is directed to be interpreted under the provisions in this behalf contained in the said Act of the first year of the reign of Her Majesty Queen



Victoria." And by s. 4, "this Act may be cited as 'The Wills Act Amendment Act, 1852.'" **2766.**

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CH. 1, s. 2.

A signature by the testator, after the witnesses have attested, although in their presence, is not a compliance with the statute 1 Vict. c. 26, s. 9. An attesting witness may sign for the testator by his direction. A will may be attested by the witnesses making marks, and the testator may write the names of the witnesses opposite their respective marks. But an attesting witness, able to write, cannot subscribe for another witness who is unable to write; yet he may guide the hand of the latter, at his request. A husband who is witness to a will cannot also subscribe for his wife. To pass over a signature previously made with a dry pen, or to correct a signature amounts to no more than an acknowledgment of a signature; and if an attesting witness, on the re-execution of a will, merely traces his previous signature with a dry pen, or corrects his signature, it is insufficient (a). **2767.**

Signature  
and attesta-  
tion.

The only safe way is, for the testator and witnesses not only to be in the same room at the time of the will being attested, but for the witnesses to be so placed that the testator can see them attest (b). **2768.**

Where a will refers to a paper, such paper cannot be incorporated with the will, unless it is both clearly identified with the description of it given in the will, and is shown to have been in existence at the time the will was executed. The onus of establishing these two matters lies on the person who seeks so to incorporate the paper (c). **2768a.**

By the stat. 1 Vict. c. 26, s. 13, "every will executed **Publication**

(a) Shelf. Real Prop. Acts, 6th ed. 487; 1 Wms. Exors. 5th ed. 82—3; *In the goods of Wm. Frith*, 1 Swa. & Tris. 8; *Hindmarsh v. Charlton*, 8 H. L. Cas. 160.

(b) Shelf. Real Prop. Acts, 6th ed. 488.

(c) *Singleton v. Tomlinson*, L. R. 3 Ap. Cas. 404.

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Ch. 1, s. 2.

not to be  
requisite.

Will not to  
be void on  
account of  
incompe-  
tency of  
attesting  
witness.

Gifts to an  
attesting  
witness to  
be void.

Creditor  
attesting to  
be admitted  
a witness.

Executor to  
be admitted  
a witness.

No altera-  
tion in a  
will shall

in manner hereinbefore required shall be valid without any other publication thereof." 2769.

By s. 14, "if any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid." 2770.

By s. 15, "if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment, shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will." 2771.

By s. 16, "in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor notwithstanding such charge shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof." 2772.

By s. 17, "no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof." 2773.

By s. 21, "no obliteration, interlineation, or other alteration made in any will after the execution thereof

shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will." 2774.

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have any  
effect unless  
executed as  
a will.

A will of immovable property, including terms for years, is generally governed by the law of the country where it is situate (a). But a will of chattels personal (not being an appointment under a power) was generally governed, as regards its requisites, its constructive interpretation, and its operation, by the law of the country which was the testator's domicile at the time of making his will and of his death, where there was no intermediate change of domicile (b). 2775.

Wills of  
testators  
domiciled  
abroad.

By the stat. 24 & 25 Vict. c. 114, it is enacted as follows: "Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed for the purpose of being admitted in England and

Stat. 24 & 25  
Vict. c. 114.  
Wills made  
out of the  
kingdom to  
be admitted,  
if made  
according to  
the law of  
the place  
where made,  
or where the  
testator was  
domiciled  
when made,

(a) 1 Jarm. Wills, 2nd ed. 1, 3, note (k); *Ferke v. Lord Carbery*, L. R. 16 Eq. 461.

(b) 1 Jarm. Wills, 2nd ed. 2—10; *Brimer v. Freeman*, 10 Moo. P. C. C. 306, 358, 359. *Ferke v. Lord Carbery*, L. R. 16 Eq. 461. As to what constitutes domicile, see Round on Domicile, and Hayes &

Jarm. Concise Forms of Wills, 6th ed., by Mr. T. S. Badger-Eastwood, 22—36, and 1 Jarm. Wills, 2nd ed. 8, 9; *Hodgson v. Du Beauchêne*, 12 Moo. P. C. 285; *Enohin v. Wylie*, 10 H. L. Cas. 1; and see 24 & 25 Vict. c. 121; *Haldane v. Eckford*, L. R. 8 Eq. 631.

Pr. III.T.15,  
Ch. 1, s. 2.

or the law of  
the domicile  
of origin.

Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin" (s. 1) (a). **2776.**

Wills made  
in the king-  
dom to be  
admitted if  
made ac-  
cording to  
local usage.

"Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made" (s. 2). **2777.**

Change of  
domicile not  
to invalidate  
will or alter  
its construc-  
tion.

"No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same" (s. 3). **2778.**

Nothing in  
this Act to  
invalidate  
wills other-  
wise made.

"Nothing in this Act contained shall invalidate any will or other testamentary instrument as regards personal estate which would have been valid if this Act had not been passed, except as such will or other testamentary instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by this Act" (s. 4). **2779.**

Extent of  
Act.

"This Act shall extend only to wills and other testamentary instruments made by persons who die after the passing of this Act" s. 5). **2780.**

(a) See *Pechel v. Hilderley*, L. R. 1 Prob. & M. 673.

## SECTION III.

*What may be Devised or Bequeathed.*

By the old law, a mere hope or chance of succession of an heir apparent or presumptive was not devisable (a). **2781.**

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CH. 1, s. 3.  
Hope of  
succession.

Nor could an interest which at the time of making of the will was contingent, if the testator was not then ascertained as the person in whom or in whose heirs the interest must vest, if it vest at all (b). But a contingent interest in fee under a shifting executory limitation in favour of a person ascertained, may be devised, both under the old law and the new, even by the heir of such person, where it would have descended (had it not been devised) not to the heir of such heir, but to the heir of such person himself, the first purchaser under the executory limitation (c). **2782.**

Contingent  
interest.

Estates which were divested and converted into rights, whether at the time of making the will or only at the testator's death were not devisable (d). **2783.**

Rights of  
entry or  
action.

By the old law, in the case of a devise of a legal estate, the will could not take effect unless the deviser was not only seised at the date of the will, but was also seised at the time of his death. Hence, if a person devised his lands, and was afterwards disseised, and died before entry, the devise was void (e). And where there was a tenant for life, with a vested remainder or a reversion immediately expectant thereon in another person, and such tenant for life levied a fine, it divested the remainder or reversion, and turned it to a right, leaving

Testator  
must have  
been seised  
at the date  
of his will  
and at his  
death.

(a) Burton, § 258.

(b) Burton, § 257, 258; 2 Pres. Shep. T. 322.

(c) *Ingilby v. Amcotts*, 21 Beav. 585.

(d) Burton, § 259; Watk. Conv. 3rd ed. by Prest. 97, 114; 1 Jarm. Wills, 2nd ed. 38, 122, 124.

(e) 6 Cruise T. 38, c. 3, § 37.

PT. III. T. 15,  
CH. 1, s. 3. in the remainderman or reversioner a mere right of entry, which was not devisable (a). 2784.

Title by  
mere possession.

It has been held that a person in possession of land without other title, has a devisable interest, and that the heir of his devisee can maintain ejectment against a person who has entered upon the land, and cannot show title or possession in any one prior to the testator (b). 2785.

Interest of  
grantor  
under a  
conveyance  
voidable in  
equity.

But where a person executed a conveyance which was voidable in equity, he had not a right of entry, but an equitable estate, which he might devise, even before the Wills Act (c). 2786.

Estate of  
mortgagee.

If a mortgagee devised the lands mortgaged before the condition was broken, such devise was void because a condition was not devisable. But an estate in mortgage may be devised after the condition is broken. And an equity of redemption being an equitable estate, is devisable (d). 2787.

Equity of  
redemption.

After-  
acquired  
property.

By the old law, a devise only operated upon such real estates as the testator had at the time of executing and publishing his will. Freehold lands purchased after that time would not pass, unless subsequent to the purchase or contract the devisor republished his will (e). Nor would copyholds, unless they were afterwards surrendered to the use of the will (f). But where an agreement in writing was entered into for the purchase of lands, and before a conveyance of the legal estate was executed the purchaser devised the lands so contracted for, and died, such devise was held good in equity (g). And even a

(a) 6 Cruise T. 38, c. 3, § 30.

(b) *Asher v. Whitlock*, L. R. 1 Q. B. 1.

(c) *Stump v. Gaby*, 2 D. M. & G. 629; *Gresley v. Mousley*, 4 D. & J. 78.

(d) 6 Cruise T. 38, c. 3, § 13, 14; 2 Pres. Shep. T. 242; Watk. Conv. 3rd ed. by Prest. 33.

(e) 2 Bl. Com. 378—9; Sugd. Concise View, 127; Burton, § 258; 1 Jarm. Wills, 2nd ed. 39. See infra, Section X.

(f) Sugd. Concise View, 128; 1 Jarm. Wills, 2nd ed. 46.

(g) 6 Cruise T. 38, c. 3, § 8; Sugd. Concise View, 125.

parol agreement for the purchase of lands, which was admitted, so as to be binding on the parties notwithstanding the Statute of Frauds, would vest such an interest in the purchaser as he might devise by will (a). A term for years, however, purchased by a testator after the execution of his will, passed by it even at law, because it is only a chattel real (b). **2788.**

Pr. III.T.15,  
CH. 1, s. 3.

By the old law, a joint tenant could not devise his share, whether he survived the other joint tenant or not. For as regards real estate, the stat. 4 & 5 Hen. 8, c. 5, only enables persons having a sole estate in fee simple or seised in fee simple in coparcenary or in common to devise. And even though the joint tenancy was severed, still the share, in the case of real property, would not pass by a will made before the severance, because the old law only considered what estate the deviser had at the time of making his will. But in the case of leaseholds or other personal property, if the joint tenancy was severed, a general or residuary bequest in a will made previous to the severance would pass the share. And the same is now the case with regard to real property, where there is a general or residuary devise made since the year 1838; as a will now operates on after-acquired property (c). **2789.**

Shares  
of joint  
tenants.

By 1 Vict. c. 26, s. 3, it is enacted, "that it shall be lawful for every person to devise, bequeath, or dispose of by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon the heir at law, or

By the stat.  
1 Vict. c. 26,  
all property  
may be  
disposed of  
by will,

(a) 6 Cruise T. 38, c. 3, § 11.

(b) 6 Cruise T. 38, c. 3, § 43; but see *supra*, par. 573—581e, and *infra*, par. 2092, as to attendant terms.

(c) Co. Litt. 185 b; 6 Cruise T. 38, c. 3, § 27, 28; 1 Jarm. Wills, 2nd ed. 35; Watk. Conv. 3rd ed. by Prest. 82.

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comprising  
customary  
freeholds  
and copy-  
holds with-  
out surren-  
der and  
before  
admittance,  
and also  
such of  
them as  
could not  
then be  
devised ;

estates pour  
autre vie ;

contingent  
and other  
future  
interests ;

rights of  
entry, and  
property  
acquired  
after  
execution  
of the will.

customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator ; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise, to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this Act had not been made, or notwithstanding that the same in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this Act, if this Act had not been made ; and also to estates pour autre vie, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament ; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will ; and also to all rights of entry for conditions broken, and other rights of entry ; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of



his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will." Pr. III.T.15, CH. 1, s. 3.  
**2790.**

This Act does not enable a testator to bequeath a chose in action, so as to pass the right of suing to the legatee (a). **2791.**

If a man possessed of a term of years contracts for the purchase of the inheritance, the term, by construction of equity, instantly attends the inheritance. And if the purchaser had previously to the purchase made his will by a general bequest in which the term would have passed, yet the legatee would not be entitled to it, although the bequest were not expressly revoked; because the term in the construction of equity attended the inheritance immediately on the purchase of the fee (b). **2792.**

An advowson appendant to a manor will pass by a devise of the manor. An advowson in gross is also devisable. And the next or any number of presentations may be devised; and the devisee thereof may either present himself or any other person (c). **2793.**

Although crops on the ground are personal estate, and generally speaking pass to the executor, yet, as between the executor and a devisee, the latter will take them with the land, unless the intention of the testator appears to be otherwise (d). **2794.**

#### SECTION IV.

##### *Of the General Rules of Construction of Wills.*

I. The grand fundamental principle in the construction of wills, is, to effectuate the intention of the testator at the moment when he made his will, so far as such intention to be effectuated. Pr. III.T.15, CH. 1, s. 4.

(a) Shelf. Real Prop. Acts, 6th ed. 484.

(c) 6 Cruise T. 38, c. 3, § 15.

(b) Sugd. Concise View, 125—6.

(d) *Vaisey v. Reynolds*, 5 Russ.

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tion is consistent with the rules of law (a). A will should therefore be most favourably expounded, to effectuate, if possible, the intention of the testator. Hence no technical words are necessary; so that the law often dispenses with the want of words in wills that are absolutely requisite in all other instruments, and frequently gives effect to a mere implication, if it is a necessary or plain implication (b). But intention alone is not sufficient to amount to a disposition of property: words must be found to carry the intention into effect. And hence a mere recital of an intention to make a complete disposition will not suffice (c). **2795.**

Intention  
must be  
collected  
from the  
words.

II. The intention must not be collected or imputed by mere conjecture, however probable; nor is it to be evidenced by averment; but it must either appear from express words or by plain implication (d). Although in the case of trusts executory, the Courts, in certain cases, properly assume a greater freedom in effectuating what appears to be the presumable general intention of the author of the trusts, yet even in the case of trusts executory, the intention must in general be collected from the language of the will itself; and an intention must not be imputed by mere uncertain conjecture contrary to the express words; and especially when it is manifest that the will was drawn, not by a person who used expressions without knowing the meaning of them, but by a person skilled in the practice of conveyancing (e). **2796.**

(a) See Burton, § 603; 6 Cruise T. 38, c. 9, § 5.

(b) 2 Bl. Com. 381; 6 Cruise T. 38, c. 9, § 2; *Sweeting v. Prideaux*, L. R. 2 Ch. D. 413.

(c) *Wylie v. Wylie*, 1 D. F. & J. 410; Lord Romilly, M. R., in *Sykes v. Sykes*, L. R. 4 Eq. 204.

(d) See observations of Lord Truro in *Egerton v. Earl Brownlow*, 4 H. L. Cas. 181; 6 Cruise T.

38, c. 9, § 40; 1 Jarm. Wills, 2nd ed. 337, 344, 353. And see remarks of Lord Chelmsford, C., and Lord St. Leonards, in *Abbott v. Middleton*, 7 H. L. Cas. 81, 95; and Lord Romilly, M. R., in *Sykes v. Sykes*, L. R. 4 Eq. 204. It is truly lamentable to observe how often this principle has been violated.

(e) *Egerton v. Earl Brownlow*, 4 H. L. Cas. 1, 181.

An exception in regard to the admissibility of extrinsic evidence of intention occurs in the case of an *ambiguitas latens*, where it appears that there are two subjects or objects answering to the description ; for in such a case, but not in other cases, of doubtful intention, extrinsic evidence, even of declarations of the testator, is admissible. The principle is, that as it is admissible to raise the doubt, it shall also be admissible to remove it (*a*). And extrinsic evidence is admissible as to the situation of a testator, as regards his family and property at the time of making his will, and other circumstances, to enable the Court to judge of his intention (*b*). But when the Court has possession of all the facts which it is entitled to know, they will only enable the Court to put a construction on the instrument consistent with the words (*c*). And where the property exactly fits the description, the whole of that property, and nothing more, passes, though it may be most probable that other property, to which some part of the description does not apply, was intended to be included (*d*). 2797.

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III. An express disposition, though probably involving an oversight or mistake by the testator, cannot be controlled by inference which is not necessary or indubitable (*e*). 2798.

Express  
disposition  
not con-  
trolled by  
inference.

IV. Whenever the intention is doubtful, it must be collected, not from particular expressions or detached passages alone, to the exclusion of considerations to be

Intention  
must be  
collected  
from the  
whole will.

(*a*) 6 Cruise T. 38, c. 9, § 43 ; *Bennett v. Marshall*, 2 K. & J. 740 ; *Fleming v. Fleming*, 1 Hurl. & Oolt. 242 ; 1 Jarm. Wills, 2nd ed. 356—7 ; 2 Id. 678 ; *Grant v. Grant*, L. R. 5 C. P. 380 ; (Ex. Ch.) 727 ; *Charter v. Charter*, L. R. 7 H. L. 364.

(*b*) 6 Cruise T. 38, c. 9, § 8 ; 2 Jarm. Wills, 2nd ed. 678—9. And see remarks of Lord *Chelmsford*, C., and of Lord *St. Leonards*, in

*Abbott v. Middleton*, 7 H. L. Cas. 82, 94 ; *Charter v. Charter*, L. R. 7 H. L. 364.

(*c*) Per Sir *E. Sugden*, C., cited 1 Jarm. Wills, 2nd ed. 352 ; *Webber v. Stanley*, 16 C. B. (N. S.) 698.

(*d*) *Webber v. Stanley*, 16 C. B. (N. S.) 698, 752.

(*e*) 2 Rep. Leg. by White, 1461 ; 2 Jarm. Wills, 2nd ed. 679.

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derived from other expressions or passages, but from the scope of the whole will, compared with its several parts, in such a way that each word may have its own particular operation, and not be rejected, if any construction can possibly be put upon it, consistently with the general intention (a). **2799.**

“There are many cases upon the construction of documents in which the spirit is strong enough to overcome the letter; cases in which it is impossible for a reasonable being, upon a careful perusal of an instrument, not to be satisfied, from its contents, that a literal, a strict, or an ordinary interpretation given to particular passages, would disappoint and defeat the intention with which the instrument, read as a whole, persuades and convinces him that it was framed” (b). **2800.**

Effect of a  
codicil.

V. A codicil duly executed supersedes every part of the will to which it is contradictory. But so far as they are not absolutely inconsistent, both the instruments are to be considered as incorporated into one (c). And the onus is on those who claim under a codicil to show that the intention to displace a devise by the will is equally clear with the original intention to devise (d). **2801.**

[An erroneous recital contained in a codicil does not vitiate the dispositions of property subsequently contained in it; and when these dispositions are inconsistent with those in the will, the will is revoked pro tanto (e).] **2801a.**

(a) 6 Cruise T. 38, c. 9, § 2; 2 Rop. Leg. by White, 1460; *Egerton v. Earl Brownlow*, 4 H. L. Cas. 181; *Brocklebank v. Johnson*, 20 Beav. 205; *Abbott v. Middleton*, 7 H. L. Cas. 68, 87, 95; 2 Jarm. Wills, 2nd ed. 115, 679, 680.

(b) Lord Justice *Knight-Bruce*, in *Key v. Key*, 4 D. M. & G. 84.

(c) Burton, § 602; *Hartley v. Tribber*, 16 Beav. 510; 2 Rop. Leg.

by White, 1460; *Butler v. Greenwood*, 22 Beav. 203; *Barnwell v. Iremonger*, 1 Dr. & Sm. 242; *Williams v. Williams*, L. R. 8 Ch. D. (Ap.) 789.

(d) *Maddison v. Chapman*, 4 K. & J. 709, 722; *Barclay v. Maske-lyne*, 1 Johns. 124; *Williams v. Williams*, L. R. 8 Ch. D. (Ap.) 789.

(e) *In re Margitson, Haggard v. Haggard*, 31 W. R. 257.

A duly attested codicil referring to a will, has the effect of republishing and incorporating the will. And hence, a gift in a will which is bad because made to an attesting witness, or the wife of an attesting witness, to the will, is validated by a codicil attested by different witnesses (a). 2802.

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CH. 1, s. 4.

VI. In a will, words, whether technical or otherwise, are to be understood as used in the sense ordinarily and properly applied to them, unless, from the whole context of the will, and the surrounding circumstances, it appears satisfactorily and clearly that the words to be construed have been used, and were intended to be understood, in some other sense (b). An exception to this, however, sometimes occurs in regard to technical expressions, in the case of trusts executory (c). 2803.

When words  
are to be  
taken in  
their proper  
sense, and  
when in  
some other.

VII. Where the words of a will admit of two different constructions, the more probable [intelligible and reasonable] of the two constructions is to prevail, unless the context requires a different construction (d). As where the words used by a testator are only applicable, in their strict technical sense, to a species of property which the testator has not: in which case they shall be applied, if possible, to some other species of property which the testator has, in order to effectuate his intention (e). And when there is no person or property exactly answering

The more  
probable  
construc-  
tion to be  
preferred.

(a) *Anderson v. Anderson*, L. R. 13 Eq. 381.

(b) 6 Cruise T. 38, c. 9, § 6; Burton, § 798; 2 Rop. Leg. by White, 1461; 1 Jarm. Wills, 2nd ed. 347, 349, 350, 365; 2 Id. 679, 680; Wilde, C. J., in *Trevor v. Trevor*, 1 H. L. Cas. 264. See also observations of Lord St. Leonards, in *Egerton v. Earl Brownlow*, 4 H. L. Cas. 208, 209; *In re Crawford's Trusts*, 2 Drew. 233; *Knight-Bruce*, L. J., in *Pride v. Fbohs*, 3

D. & J. 266; and remarks of Lord Westbury in *Gordon v. Gordon*, L. R. 5 H. L. 279; and of Lord Cairns, Id. 284; *Bathurst v. Errington*, L. R. 2 Ap. Cas. 698; *In re Parker, Bentham v. Wilson*, L. R. 15 Ch. D. 528; 17 Ch. D. (Ap.) 262.

(c) See supra, par. 687 et seq., 701—2.

(d) 2 Rop. Leg. by White, 1462; 2 Jarm. Wills, 2nd ed. 679.

(e) 6 Cruise T. 38, c. 10, § 87.

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Words  
importing  
the future.

Relative  
construc-  
tion of  
ambiguous  
expressions.

Same words  
having a  
different  
construc-  
tion.

Words re-  
jected, sup-  
plied, or  
changed.

the particular description, it is proper to see if there is any such person or property coming near the description, as, under the particular circumstances of the case, must be taken to be the person or property intended to be referred to, though inaccurately described in the will (a). And words strictly importing a future tense may, in order to effectuate the intention apparent from the context, be construed to refer to the past (b). 2804.

VIII. It is a rule involved in or flowing from the preceding rules, that if an expression admits of two constructions, one of which would defeat, while the other would effectuate, the testator's intention, the latter shall be preferred (c). In many cases, however, this rule has been lamentably disregarded. 2805.

IX. The same words may have a different construction in the same will, especially when applied to different kinds of property. But in general, where a testator uses the same words in different parts of the will, it is to be presumed he attaches to them the same meaning, unless a different intention can be collected from the context (d). 2806.

X. Where there are words in a will which have no meaning, or which are evidently contrary to the general intention of the testator, they are rejected. And, on the other hand, if the meaning distinctly appears, words omitted by mistake, which are absolutely necessary to effectuate the general intention to be collected from the whole will, are supplied (e). And where it is apparent

(a) *Chitty, J., in Re Bonner, Tucker v. Good*, L. R. 19 Ch. D. 205.

(b) 2 Rop. Leg. by White, 1517.

(c) See *Whicker v. Hume*, 7 H. L. Cas. 154, 162, 167; and *Martelli v. Holloway*, L. R. 5 H. L. 532.

(d) 2 Rop. Leg. by White, 1460—1462; 6 Cruise T. 38, c. 9, § 8; 2

Jarm. Wills, 2nd ed. 680; *Rhodes v. Rhodes*, 27 Beav. 413.

(e) 6 Cruise T. 38, c. 9, § 15; 2 Rop. Leg. by White, 1461; 1 Jarm. Wills, 2nd ed. 401, 408; *Abbott v. Middleton*, 21 Beav. 143; 7 H. L. Cas. 68; *Towns v. Wentworth*, 11 Moo. P. C.C. 526, 543; *Knight-Bruce*, L. J., in *Pride v. Fooks*, 3 D. & J. 266.

from the will itself, not only that the testator has used a wrong word or phrase, but also what is the precise thing he intended to have expressed, the word or phrase which would rightly express what he so intended will be substituted, so as to effectuate his real intention (*a*). But the Court is not justified either in inserting or striking out words, or in any manner altering the language of a clear, unambiguous devise, upon mere conjecture, or upon the mere ground that the devise seems capricious, and that a gift in other terms would be in conformity with other dispositions in the will (*b*). **2807.**

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Ch. 1, s. 4.

XI. Courts of Law and Equity will transpose words, where it is necessary to do so, to make sense of a will and give effect to it (*c*). So that an estate will be transposed, and placed either before or after some other estate given by the will, if such transposition is necessary to fulfil the intent of the testator (*d*). **2808.**

Transposition.

XII. Where there is a manifest general, primary, or paramount intent, the construction should be such as to effectuate it, though by that construction some particular, secondary, or subordinate intent may be defeated (*e*). **2809.**

Particular intent sacrificed to general intent.

XIII. A testator is presumed to know the law, whether as declared by decision or made by statute (*f*). **2810.**

Testator presumed to know the law.

XIV. Mistakes in a will are never to be presumed, if a reasonable construction can be found out (*g*). **2811.**

Mistakes not presumed.

XV. If two parts of a will are totally inconsistent, and cannot possibly be reconciled, the latter shall prevail, on

Inconsistent clauses.

(*a*) See 1 Jarm. Wills, 420 et seq.

Jarm. Wills, 2nd ed. 397.

(*b*) *Towns v. Wentworth*, 11 Moo. P. C. C. 550; and remarks of Lord Cranworth, in *Abbott v. Middleton*, 7 H. L. Cas. 89, cited by Lord Cairns, in *Gordon v. Gordon*, L. R. 5 H. L. 284.

(*e*) 6 Cruise T. 38, c. 9, § 4; 1 Pres. Shep. T. 87. See supra, par. 406 et seq.

(*c*) 2 Rop. Leg. by White, 1460; 1 Jarm. Wills, 2nd ed. 397, 417.

(*f*) See judgment of Sir J. Wigram, in *Buckell v. Blenkhorn*, 5 Hare 144. But see remarks of Sir L. Shadwell, in *Ware v. Rowland*, 15 Sim. 595, apparently contra.

(*d*) 6 Cruise T. 38, c. 9, § 25; 1

(*g*) 2 Rop. Leg. by White, 1456.

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the principle that the testator may have changed his mind (*a*). 2812.

Devesting  
words must  
be as clear  
as vesting  
words.

XVI. Where an estate or benefit is conferred in one part of an instrument, in terms which are free from all doubt, such estate or benefit cannot be taken away, except by reasonably clear words in another part of the instrument (*b*). 2813.

Uncer-  
tainty.

XVII. Where it is impossible to discover from the words of a will what was meant to be given, or to whom, the will is void for uncertainty. But a reasonable degree of certainty will suffice (*c*). 2814.

Prevention  
of intestacy.

XVIII. Of two modes of construction of a will of personalty, that is to be preferred which will prevent intestacy (*d*). 2815.

At what  
time a will  
speaks.

XIX. Expressions of present time refer to the date of the will; and, under the old law, devises, as regards the subject, refer to the date of the will. But even under the old law, in the absence of expressions of present time or other clear indications to the contrary, a will of personalty as regards the subject, speaks at the testator's death (*e*). And by the stat. 1 Vict. c. 26, s. 24, it is enacted, "that every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed

(*a*) 6 Cruise T. 38, c. 9, § 27; Burton, § 602; 2 Rop. Leg. by White, 1461—2; 1 Jarm. Wills, 2nd ed. 394, 396—7; 2 Id. 678; *Brocklebank v. Johnson*, 20 Beav. 212, 213.

(*b*) *Thornhill v. Hall*, 2 Cl. & F. 22, 36; *Randfield v. Randfield*, 4 Drewry 147; 8 H. L. Cas. 235, 238; *Blagrove v. Bradshaw*, 4 Drew. 230; *Abbott v. Middleton*, 7 H. L. Cas. 68, 85, 96, 97, 101, 112; *Hodgson v. Clark*, 1 Gif. 139.

(*c*) 6 Cruise T. 38, c. 8, § 38; 1 Jarm. Wills, 2nd ed. 295—301, 304,

310, 311; *Adams v. Jones*, 9 Hare 485; *Drake v. Drake*, 25 Beav. 642; 8 H. L. Cas. 172; *Maynard v. Wright*, 26 Beav. 285.

(*d*) 2 Rop. Leg. by White, 1461, 1462; 2 Jarm. Wills, 2nd ed. 680; *In re Redfern*, *Redfern v. Bryning*, L. R. 6 Ch. D. 133; *In re Ord*, *Dickinson v. Dickinson*, L. R. 12 Ch. D. (Ap.) 22.

(*e*) 1 Rop. Leg. by White, 150; 1 Jarm. Wills, 2nd ed. 261, 269; *Palin v. Hills*, 1 My. & K. 484; *Godson v. Dotterill*, Id. 59.



immediately before the death of the testator, unless a Pt. III.T.15,  
CH. 1, s. 4. contrary intention shall appear by the will (a). Thus, where in a devise made subsequent to the year 1837, the testator uses the expression, "all the hereditaments of which I am now seised," after-acquired real estate will pass (b). But where he uses the expression, "all the estate whereof I am now seised," or "now occupied by me," and he uses the word "now" in other parts of his will in allusion to the period when he was making his will; the will in such case will not speak from his death (c). This section does not apply to the objects of the testator's bounty, but only to the subjects. As regards the objects, in the absence of indications to the contrary, devises and bequests, whether under the old law or the new, speak from the date of the will, except in the case of children or descendants, who, from a desire to include as great a number as possible, are held to include those who answer the description at the death of the testator (d). **2816.**

This section applies to the wills of married women, in the same manner as to those of other persons (e). **2817.**

XX. The construction of wills of immovable property Lex loci. is governed by the *lex loci rei sitæ*, but the construction of wills of movable property is generally governed by the law of the domicile (f). **2818.**

(a) *Jepson v. Key*, 2 Hurl. & Colt. 873; *In re Gibson*, L. R. 2 Eq. 669; *Wagstaff v. Wagstaff*, L. R. 8 Eq. 229; *Saxton v. Saxton*, L. R. 13 Ch. D. 359, compared with *Boyes v. Cook*, L. R. 14 Ch. D. (Ap.) 53; *Castle v. Fox*, L. R. 11 Eq. 542; *In re Ruding's Settlement*, L. R. 14 Eq. 266.

(b) *Doe d. York v. Walker*, 12 M. & W. 591; *Lady Langdale v. Briggs*, 3 Sm. & Gif. 246; *Lord Lilford v. Pomeys Keck* (No. 2), 30 Beav. 300.

(c) *Cole v. Scott*, 1 Mac. & G. 518;

*Hutchinson v. Barrow*, 6 Hurl. & Norm. 583. See also judgment of V.-C. Stuart, in *Lady Langdale v. Briggs*, 3 Sm. & Gif. 2; and see *Everett v. Everett*, L. R. 7 Ch. D. (Ap.) 428.

(d) Shelf. Real Prop. Acts, 499; 1 Jarm. Wills, 2nd ed. 262, 266, 267, 269; *Bullock v. Bennett*, 7 D. M. & G. 285.

(e) *Thomas v. Jones*, 2 J. & H. 475; 1 D. J. & S. 63; *Noble v. Phelps*, L. R. 2 Prob. & M. 276, 285.

(f) 2 Rop. Leg. by White, 1462;

Pr. III.T.15,  
Ch. 1, s. 4.

Civil law  
followed as  
to purely  
personal  
legacies;  
common  
law as to  
others.

XXI. In deciding on the validity and interpretation of purely personal legacies, Courts of Equity generally follow the rules of the civil law as recognised and acted on in the Ecclesiastical Courts; but as to the validity and interpretation of legacies charged on land, they generally follow the rules of the common law (a).  
2819.

Substituted  
or additional  
legacies go-  
vern by  
the original  
legacies.

XXII. When there is a substitution of legacies or an addition to them, and no times are appointed for the payment of the substituted or additional bequests, nor any funds assigned out of which they are to be satisfied, those legacies are to be paid out of the same property, at the same periods, under the same restrictions, and with the same incidents as the legacies in lieu of or in addition to which they are given (b). And this construction will be adopted, even where the subsequent gift is not expressed to be in substitution for or in addition to the first gift, but is given simpliciter, without any indication of a connecting or an assimilative intention (c). Thus, where a testator gives a legacy by will out of a particular fund, and by a codicil revokes it, and gives a legacy of a different amount, without mentioning out of what it is to be paid, the legacy by the codicil will be deemed to be a mere substitution for the legacy by the will, in regard to the fund out of which it is to be paid, as well as in regard to the amount; so that if the particular fund fails, the legacy will not be paid out of the general assets (d). And where a testator by his will gives an annuity to a femme covert for her separate use for life, and by a codicil he gives a certain sum "in

1 Jarm. Wills, 2nd ed. 1—4; *Enohin v. Wylie*, 10 H. L. Cas. 1. See *supra*, par. 2775—2780.

(a) Story's Eq. Jur. § 602, 608.

(b) 1 Rep. Leg. by White, 872; 1 Jarm. Wills, 2nd ed. 154; *Duncan v. Duncan* (No. 2), 27 Beav.

392. But see *Re Wilder's Trusts*, 27 Beav. 418; *Gallemore v. Gill*, 8 D. M. & G. 567.

(c) *Johnstone v. Lord Harrowby*, 1 D. F. & J. 183, reversing decision of V.-C. Wood, 1 Johns. 425.

(d) *Bristow v. Bristow*, 5 Beav. 289.

addition" thereto for her life, she will take the additional sum for her separate use, as well as the sum given by will (a). But this assimilative construction will not be adopted if it would unnecessarily render a distinct additional gift dependent on the legatee surviving the tenant for life, where by the terms of such gift, apart from the words "in addition," it would be vested (b). **2820.**

PT. III. T. 15,  
CH. 1, s. 4.

## SECTION V.

### *Of the Construction of particular Words and Expressions in Wills (c).*

A direction that legacies be paid "clear," means that they shall be paid clear of legacy duty (d). **2821.**

PT. III. T. 15,  
CH. 1, s. 5.

In some cases "taxes" or "deductions" have been held to include, and in other cases not to include income or property tax (e). [Thus where a testator bequeathed an annuity "free from all deductions and abatement whatsoever," it was held that the annuity was not given free of income tax (f).] If it is intended that a person to whom an annuity or other gift is made should have it clear of property tax, such tax should be specifically mentioned in order to exclude all doubts. **2822.**

"Clear."  
"Taxes"  
and "deduc-  
tions."

A covenant by a lessee to pay "all taxes and assessments" does not include tithe rent-charge (g). **2822a.**

"Taxes and  
assess-  
ments."

(a) *Day v. Croft*, 4 Beav. 561.

(b) *King v. Tootel*, 25 Beav. 23.

(c) This section only notices a few points, for which no more appropriate place could be found elsewhere. Where the points of construction could be distributed under specific heads, the writer deemed it most proper to do so. See, for instance, Section VI., and Chap. III., Section II.

(d) *Ford v. Ruxton*, 1 Coll. 403;  
*In re Coles' Will*, L. R. 8 Eq. 271.

(e) *Wall v. Wall*, 15 Sim. 513;  
*Lethbridge v. Thurlow*, 15 Beav. 334; *Sadler v. Richards*, 4 K. & J. 302; *Turner v. Mullineux*, 1 Johns. & Hem. 334; *Lord Lovat v. Duchess of Leeds* (No. 1), 2 Dr. & Sm. 62; *Festing v. Taylor*, 3 Best & Smith, 217; *Abadam v. Abadam*, 33 Beav. 475.

(f) *Gleadom v. Leatham*, L. R. 22 Ch. D. 269.

(g) *Jeffrey v. Neale*, L. R. 6 C. P. 240.

Pr. III.T.15,  
Ch. 1, s. 5.

"Shares,"  
"parts," or  
"portions."

Where real or personal estate is given to a class of persons, with a direction, that on the death of any of them, their "shares," "parts," or "portions" are to go over, the original shares only, and not the accruing shares, will go over; unless the word "interest" is added, or there is an apparent intention to keep the property in one aggregate mass, or there is some other indication of an intention that the accruing shares should also go over (a). **2823.**

The word "part," in the absence of indication to the contrary, will include not only an immediate share, but also a share in remainder (b). **2824.**

Where a devise or bequest is made to two or more persons, with words of survivorship, it is very important to express the period to which the survivorship refers—whether, for instance, to the death of the testator, or the death of a tenant for life. In the absence of indication to the contrary, it will be referred to the period of division (c). **2825.**

'Survivors'  
or "survi-  
vor."

In the case of a limitation over to the survivors or survivor of a class, the word "survivors" or "survivor" is construed as if it had been "others" or "other," where it was apparently the intention of the testator or settlor that the others or other should take, without reference to the contingency of his, her, or their surviving the person from whom the property is to go over; as when the alternate gift over is only to take effect on the death of all the class without issue. And this construction may be adopted even where the same word may require to be taken in its natural sense in other clauses of the

(a) 2 Rop. Leg. by White, 1398;  
2 Jarm. Wills, 3rd ed. 661—8;  
*Douglas v. Andrews*, 14 Beav. 347;  
*Rickett v. Guillemard*, 12 Sim. 88;  
*Goodwin v. Finlayson*, 25 Beav. 65;  
*Evans v. Evans*, 25 Beav. 81; *Dalton*  
*v. Crowley*, 33 Beav. 272.

(b) *Watson v. Pryce*, 34 Beav.  
71.

(c) See *Cripps v. Wulcot*, 4 Mad.  
15; *Re Gregson's Estate*, 2 D. J.  
& S. 428; *Bowers v. Bowers*, L. R.  
5 Ch. Ap. 244; and other cases  
cited 2 Wms. Ex. 6th ed. 1355—6.

same settlement referring to the same fund. But when unexplained by the context, the word will be construed according to its literal meaning (a). And the word "survivors" cannot be construed "others" where the gift over is not entirely to the same class (b). **2826.**

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It has been held that a person attains his twenty-fifth year on the day when he becomes twenty-four years old (c). **2827.**

"Attaining  
his twenty-  
fifth year."

The word "unmarried," or the words "without being married," whether in a deed or will, may mean either without having ever been married, so as to exclude issue, or "discovert, or without a husband or wife at the time," so as to exclude a husband or wife, but not issue. And in some cases it receives the former construction, and in others the latter, even in the same instrument, according to the apparent intent of the settlor or the testator. When applied to a person who is not married at the time, and whose marriage is not expressly or plainly contemplated by the instrument, it generally receives the former construction; while if applied to a person who is married at the time, or whose marriage is contemplated by the instrument, it generally receives the latter construction (d). But in the absence of a

"Unmar-  
ried," or  
"without  
being mar-  
ried."

(a) 1 Rep. Leg. by White, 638; 2 Jarm. Wills, 2nd ed. 578, 580, 588; *Greenwood v. Percy*, 26 Beav. 572; *Holland v. Allsop*, 29 Beav. 498; *In re Keep's Will*, 32 Beav. 12; *Blundell v. Chapman*, 33 Beav. 648; *Hodge v. Foot*, 34 Beav. 349; *Hurry v. Morgan*, L. R. 3 Eq. 152; *Badger v. Gregory*, L. R. 8 Eq. 78; *In re Arnold's Trusts*, L. R. 10 Eq. 252; *Waite v. Littlewood*, L. R. 8 Ch. Ap. 70; *In re Palmer's Settlement Trusts*, L. R. 19 Eq. 320; *Cross v. Maltby*, L. R. 20 Eq. 378; *Wake v. Varah*, L. R. 4 Ch. D (Ap.) 348; *In re Horner's*

*Estate, Pomfret v. Graham*, L. R. 19 Ch. D. 186.

(b) *De Garognol v. Liardet*, 32 Beav. 608.

(c) *Grant v. Grant*, 4 Y. & C. Ex. 256.

(d) See 1 Rep. Leg. 616, 617; 1 Jarm. Wills, 2nd ed. 435—7; *In re Saunders' Trust*, 3 K. & J. 152; *In re Norman*, 3 D. M. & G. 965; *Pratt v. Matthem*, 22 Beav. 328, 331—4; *Mitchell v. Colls*, 1 Johns. 674; S. C. nom. *Clarke v. Colls*, 9 H. L. Cas. 601; *Day v. Barnard*, 1 Dr. & Sm. 351; *Pratt v. Matthem*, 8 D. M. & G. 522; *Heywood v.*

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context showing a contrary intention, the word "unmarried" must be construed according to its ordinary meaning, as "having never been married" (a). 2828.

"Who have  
issue."

Under a residuary devise and bequest to be equally divided between the testator's wife "and her children who have issue," the word "have" will not be construed "shall have," but those children who have no issue at his death take nothing; for, as a devise to her and her children would include only the children living at that time, the superadded description of having issue is applicable to those children who then have issue (b). 2829.

Death  
"without  
leaving  
children"  
(c).

Where there is an intention that a child shall take a vested interest at a particular period, and words are introduced which would divest the interest in the event of the parent dying without leaving a child, there, if the interest has once vested, and the testator has not too clearly expressed his object to admit of a doubt, the Court will struggle to maintain the vested gift by construing the words "without leaving" to mean "without having had" (d). 2830.

"Subject to  
the perform-  
ance of the  
covenants."

There is this distinction between testamentary dispositions of estates in mortgage "subject to the incumbrances thereon," and of leasehold estates "subject to the performance of the covenants," that the words "subject," etc., when used in reference to mortgages are not mere useless surplusage, even when they are not construed to import that the party is to take cum onere; for they may be intended to prevent disappointment, and perhaps disputes or doubts, by showing at once

*Heywood*, 29 Beav. 9; *In re Saunders' Trusts*, L. R. 1 Eq. 675; *Upton v. Brown*, L. R. 12 Ch. D. 872.

(a) *Dalrymple v. Hall*, L. R. 16 Ch. D. 715.

(b) *Doe d. Burton v. White*, 1 Exch. 526.

(c) As to gifts over on "dying unmarried or without children or issue," see *supra*, par. 277.

(d) *White v. Hill*, L. R. 4 Eq. 265.

that the estate is in mortgage, which might not otherwise be known to be so. But the words "subject," etc., when used with reference to property which has already been described as a leasehold, are mere useless surplusage, unless they are used to signify that the bequest is to be subject to the performance of the covenants to repair, in respect of dilapidations existing at the time of the testator's death; and the Court ought not, without some special reason, to construe words as mere surplusage which may fairly be employed for some useful purpose. It is only natural, and in accordance with the presumable intentions of a testator who makes a specific bequest of leaseholds, that the legatee should take them subject to the burden of putting them in repair, where they are in a state of dilapidation at the time of the testator's decease; although the general personal estate is the natural fund for the payment of debts, and other kinds of property are commonly exonerated by that (*a*). **2831.**

Where a testator provides that an estate shall go over "Devolve." from a person taking the same under the will, in case a certain other estate shall "devolve" upon him, he will be held to mean that the shifting clause shall take effect in case such person shall have the full beneficial enjoyment of the latter estate: so that such estate will not be deemed to have "devolved" upon him, if he takes it subject to a charge (*b*). And the expression "devolve upon her children, if she has any," denotes transmission to children living at the time when the devolution is to take place; so that the representative of a child then dead will take nothing (*c*). **2832.**

The word "legacies" will often include annuities (*d*). **2833.**

"Legacies" including "annuities."

(*a*) *Hickling v. Boyer*, 3 Mac. & G. 643.

(*b*) *Fazakerley v. Ford*, 1 Ad. & E. 97; 4 Sim. 390.

(*c*) *Parr v. Parr*, 1 My. & K. 467.

(*d*) 2 Jarm. Wills, 2nd ed. 516; *Cornfield v. Wyndham*, 2 Coll. 184;

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"London."

In a will, the word "London" will include the cities of London and Westminster, and the borough of Southwark, and the adjacent streets and buildings, where such would seem to have been the intention (a). 2834.

"Strict settlement."

Under an executory trust for the settlement of real estate "in strict settlement," the tenant for life should not be made punishable for waste (b). 2835.

"All the rest."

The expression "all the rest," though following a gift of a house and garden which were leasehold, may pass the real estate (c). 2836.

"Free occupancy."

Where a testator leaves to a person for life "the free occupancy" of any house in his possession, such person is entitled either to reside in it or to let it (d). 2837.

"Estate tail in possession."

The words "estate tail in possession," properly, but not necessarily, refer to actual possession: they may refer to an estate tail vested in interest as a remainder, as distinguished from a contingent interest in tail (e). 2838.

"So specifically devised" or "bequeathed."

Where there are both original devises or bequests to certain persons, and also contingent devises or bequests over to each of them, and these are followed by limitations over of the property "so specifically devised" or "bequeathed," these words "so specifically," etc., may refer either to the property comprised in the original gifts only, or to the property expressed in the gifts over; and therefore care should be taken, in framing such a limitation over, to prevent all doubt; though, in the absence of an apparent intention to the contrary, these words will be held to apply to the property comprised in

*Heath v. Weston*, 3 D. M. & G. 601;

*Ward v. Grey*, 26 Beav. 485;

*Mullins v. Smith*, 1 Dr. & Sm. 204;

*Gaskin v. Rogers*, L. R. 2 Eq. 284.

(a) *Wallace v. Att.-Gen.*, 33 Beav. 384.

(b) *Stanley v. Coulthurst*, L. R.

10 Eq. 259.

(c) *Attree v. Attree*, L. R. 11 Eq. 280.

(d) *Mannox v. Greener*, L. R. 14 Eq. 456.

(e) *Martelli v. Holloway*, L. R.

5 H. L. 532.



both, as equally applicable to the property comprised in each (a). **2839.**

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[In gifts over if the legatee should die before "the division of my estate," it is necessary to be very explicit as to the meaning of that expression, since no less than six different possible constructions of the word division have been suggested; and it has been held to mean the period allowed by law for the division of the testator's estate; namely, the expiration of twelve months from his death (b).] **2839a.**

Gift over if  
the legatee  
should die  
before "the  
division of  
my estate."

## SECTION VI.

### *Of Devisees and Legatees.*

Where a devise or bequest is made to a person or persons by any description denoting a person sustaining a particular character (such as heir, next of kin, nearest of blood, youngest or only surviving son), and the person or persons who sustain it at one time may be different from the person or persons who sustain it at another time, it is very expedient to express the time at which that character is to be sustained (c). **2840.**

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Ch. 1, s. 6.

Devise or  
bequest to  
persons  
sustaining a  
particular  
character.

#### *I. Error or Defect in a Name or Description.*

Any words that are sufficient to denote the persons meant by the testator, and to distinguish them from all others, operate as a good description (d). **2841.**

General  
rule.

When there is a mistake in the Christian or surname, or in both names, it will be corrected, if the intention clearly appears in any other part of the will or by parol evidence (e). But where there is a relative having the names mentioned, but described as standing in a different

Mistake in  
name.

(a) *Giles v. Melsom*, L. R. 6 H. L. 24.

(b) *In re Collison, Collison v. Barber*, L. R. 12 Ch. D. 834.

(c) See *supra*, par. 880—1; and 2 Jarm. Wills, 2nd ed. 167—180.

(d) 6 Cruise T. 38, c. 10, § 23; 1 Jarm. Wills, 2nd ed. 310, 311.

(e) 1 Rep. Leg. by White, 164, 166; Burton's Compendium, § 605;

1 Jarm. Wills, 2nd ed. 312, 368; *Mostyn v. Mostyn*, 5 H. L. Cas.

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Ch. 1, s. 6.

degree of relationship from that mentioned, and there are other relatives having some only of the names and standing in the relationship mentioned, the gift will be void for uncertainty if there be no other evidence than that of the solicitor who prepared the will (a). **2842.**

Blank for  
name.

Parol evidence will be admitted to supply a blank for a Christian name, but not a blank for an entire name (b). **2843.**

Initials.

If, however, a legatee is described by the initials of his name only, parol evidence may be given to prove his identity (c). But if a testator devises to certain persons by no other names or descriptions than by certain letters of the alphabet arbitrarily chosen for the purpose, and refers to another paper signed by him, but not attested as explaining who were intended by those letters, such a devise is void (d). **2844.**

Arbitrary  
signs.

Error in  
description  
of a legatee.

There is no presumption in favour of the name more than of the description (e). But where the description of a legatee is erroneous, and there is no doubt as to the person intended to be described, the mistake will be rectified, unless the description imputes to the legatee a character which is the essence of the bequest, and it may reasonably be presumed that the testator would not have made such a bequest, if he had not been so mistaken (f). **2845.**

155 ; Wigram on Wills, 51 ; *Blundell v. Gladstone*, 2 Phill. 279 ; *Bernasconini v. Atkinson*, 17 Jur. 128 ; *Re Blackman*, 16 Beav. 377 ; *Hodgson v. Clarke*, 1 D. F. & J. 394 ; *Charter v. Charter*, L. R. 7 H. L. 364.

(a) *Drake v. Drake*, 25 Beav. 642 ; 8 H. L. Cas. 172.

(b) 1 Rop. Leg. by White, 186 ; *Re Gregson's Trusts*, 2 Hem. & M. 504.

(c) 1 Rop. Leg. by White, 187.

(d) *Clayton v. Lord Nugent*, 13

M. & W. 200.

(e) *Drake v. Drake*, 8 H. L. Cas. 172, 179 ; *Charter v. Charter*, L. R. 7 H. L. 364.

(f) 1 Rop. Leg. by White, 169, 172 ; Story's Eq. Jur. § 182, 183 ; 1 Jarm. Wills, 2nd ed. 312 ; *Re Ricket's Trusts*, 11 Hare 299 ; *Stringer v. Gardiner*, 4 D. & J. 468 ; see *In re Petts*, 27 Beav. 576 ; *Garner v. Garner*, 29 Beav. 114 ; *Farrer v. St. Catherine's Coll.*, L. R. 16 Eq. 19 ; *Garland v. Beverley*, L. R. 9 Ch. D. 213.

## II. *Devisees and Bequests to Parents and Children.*

In the case of devises and bequests in favour of a person and his or her children, at least in wills drawn by unprofessional persons, questions frequently arise as to the mode in which they are to take—whether the parent is to take for life, with remainder to the children; or whether the parent is to take an estate tail or the absolute interest; or whether parent and children are to take simultaneously, and, if so, whether as tenants in common or as joint tenants. All such questions should be excluded (a). 2846.

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Questions  
arising on  
such be-  
quests.

When a man gives to his wife for the benefit of herself and her children, she and her children take as joint tenants, unless there is some indication that she is to take for life with remainder to her children, or in some other manner (b). A direction that the property should be “secured” has been considered to be such an indication (c). 2847.

Whenever the word “entitled” is used, it is highly expedient to specify whether it is meant “entitled in interest” or “entitled in possession” (d). 2848.

Where a testator bequeaths personal estate to one for life, and after his death to others equally, and in case any of them should happen to die before they become “entitled” to their shares, to the children of him, her,

Where issue  
are only  
substituted  
in the event  
of the parent  
predeceas-  
ing the  
testator.

(a) For instances, see *Lenden v. Blackmore*, 10 Sim. 626; *Vaughan v. Headford*, Id. 639; *Mason v. Clarke*, 17 Beav. 126; *Congreve v. Palmer*, 16 Beav. 435; *Ive v. King*, Id. 46; *Hart v. Tribe*, 18 Beav. 215; *Webb v. Byng*, 2 K. & J. 669; 8 D. M. & G. 633; S. C. nom. *Byng v. Byng*, 10 H. L. Cas. 171; *In re Graham's Will*, 33 Beav. 479; *Greeve v. Greeve*, L. R. 4 Eq. 180; *Davis v. Bennett*, 4 D. F.

& J. 327; *Breton v. Mockett*, L. R. 9 Ch. D. 95.

(b) *Newill v. Newill*, L. R. 12 Eq. 432; reversed L. R. 7 Ch. Ap. 253.

(c) *Combe v. Hughes*, L. R. 14 Eq. 415.

(d) See *Chorley v. Loveband*, 33 Beav. 189; *Turner v. Gosset*, 34 Beav. 593; *Umbers v. Jaggard*, L. R. 9 Eq. 200; *Hobgen v. Neale*, L. R. 11 Eq. 48.

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CH. I, S. 6.

or them so dying, the word "entitled" does not mean "entitled in possession"; but the gift to the children is merely a substitution in the event of the parent dying in the testator's lifetime: so that if one of the parents survives the testator, and dies before the tenant for life, the property vests in his representative, and does not go over to his children (a). And under a bequest to A. or his children, he is absolutely entitled if he survives the testator: the children can only take by substitution in case of the death of their parent in the testator's lifetime (b). 2849.

### III. *Devisees and Bequests to Children.*

Infant in  
ventre  
matris.

In construing a will, an infant in ventre matris is considered as a child "living," and even as a child "born," that word being read as synonymous with pro-created (c). 2850.

Who take  
where no  
period for  
distribu-  
tion is ap-  
pointed.

In the absence of indications to the contrary, where a legacy is given to a class of individuals, as to children, in general terms, and no period is appointed for the distribution of it, the death of the testator is the period of distribution, and none of the class but those who are born or in ventre matris at that period are entitled to participate in the bequest; and those members of the class who at his death are capable of taking take the whole. And so, as a general rule, where a period is appointed for distribution, as the attainment of majority or the death of a parent, the fund is distributable among as many as come into existence before that time, and no child born afterwards can be admitted to a share (d). 2851.

Who take  
where a  
period for  
distribution  
is ap-  
pointed.

(a) *Henderson v. Kennicot*, 2 De G. & S. 492.

(b) *Penley v. Penley*, 12 Beav. 547.

(c) 6 Cruise T. 38, c. 2, § 16;

Watk. Conv. 3rd ed. by Prest. 243; 2 Jarm. Wills, 2nd ed. 153—4; and *Pearce v Carrington*, L. R. 8 Ch. Ap. 969.

(d) 1 Rep. Leg. by White, 38,

[Where there is a gift to a class of persons, some of whom are within the rule against perpetuities and some not; and the share of every member of the class cannot be ascertained within the legal limits as to time, the whole gift is void. But when the share of every member can be so ascertained, the gift is valid with respect to those members who come within the rule against perpetuities, though invalid as to the rest (a).] **2851a.**

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CH. 1, s. 6.

Gift to a class of persons, some within the rule against perpetuities and some not.

If there is a bequest to children "begotten" or "to be begotten," or "who may be born," these words refer only to children who may be born after the date of the will and before the death of the testator, and not to children born after his decease, where a different construction would impute to the testator the inconvenient and improbable intention that his residuary personal estate should not be distributed until after the deaths of the parents of the legatees (b). **2852.**

Bequest to children "begotten" or "to be begotten," or "who may be born."

[If a testator bequeath a certain sum to each of the children of a certain person, only those children of that person who are in esse at the death of the testator, can be admitted to share in the bequest; otherwise the distribution of the testator's estate would have to be postponed, until it could be ascertained how many children that person would have, and consequently how many of such gifts would become payable. But if a testator bequeath a certain sum to be divided among the

Bequest of a certain sum to each of the children of a certain person.

Bequest of a certain sum to be divided among the

46, 53; 2 Spence's Eq. Jur. 418; Smith's Executory Interests annexed to Fearne, § 227—234; 2 Jarm. Wills, 2nd ed. 126—130; *Mann v. Thompson*, Kay 638; *Hagger v. Payne*, 23 Beav. 474, 478; *Bateman v. Gray*, 29 Beav. 447; *In re Gardiner's Estate*, L. R. 20 Eq. 647; *In re Coleman and Jarrom*, L. R. 4 Ch. D. 165; *In re Emmet's Estate*, L. R. 13 Ch. D. Ap.) 484. On this subject the reader

is referred to Mr. O. D. Tudor's very valuable work on cases on Real Prop. Conv. & Construction, 3rd ed. 798—808.

(a) *Wilkinson v. Duncan*, 30 Beav. 111.

(b) 2 Jarm. Wills, 2nd ed. 148—9; *Storrs v. Benbow*, 2 My. & K. 46; 3 D. M. & G. 390; *Butler v. Lowe*, 10 Sim. 317; *Townsend v. Early*, 28 Beav. 429.

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children of  
a certain  
person.

children of a certain person, then, as such a gift does not necessitate the postponement of the distribution of the testator's estate, but only of the division of the sum, until the number of such children can be ascertained, those children of that person who are born after the death of the testator, are also admitted to share in the bequest. This is described by Jessel, M. R., as a rule of convenience (a)]. **2852a.**

Whether  
children of  
a subse-  
quent mar-  
riage are  
included.

The word "children" will include children by a second or other subsequent marriage, unless it clearly appears that the testator only meant children of the first marriage (b). **2853.**

Whether  
grandchil-  
dren or issue  
generally  
are in-  
cluded.

The word "children" does not ordinarily comprehend grandchildren or issue generally; but it will be construed in this more extensive sense where the will would otherwise be inoperative, or where the testator has clearly shown by other words that he used the word in the more extensive sense (c). **2854.**

Where it is  
sufficient  
to answer  
the descrip-  
tion in sub-  
stance,  
though not  
literally.

In general, even in the case of a will, the persons who claim must answer the description and character given of them in the will (d). But sometimes they may not answer the description and character literally, and yet they may answer what was really intended by such description and character. Thus in the case of provisions made for younger children, by will or marriage settlement, or by way of executory trust, by the parent or a person who stood in loco parentis, as being under a moral obligation to provide for the children or as intending to take upon himself or herself those duties and obligations which ordinarily and properly attach to a father or mother, a younger child becoming entitled to

Where a  
younger  
has been  
considered  
as an eldest  
child.

(a) *Rogers v. Mutch*, L. R. 10  
Ch. D. 25.

(b) 1 *Rop. Leg.* by White, 48;  
2 *Jarm. Wills*, 2nd ed. 123—4.

(c) 1 *Rop. Leg.* by White, 68;

2 *Jarm. Wills*, 2nd ed. 124—5;  
*Pride v. Fooks*, 3 D. & J. 252, 266;  
*Re Crawhall's Trust*, 8 D. M. & G.  
480.

(d) 1 *Rop. Leg.* by White, 66.

the family estate has been considered an eldest child, so as to exclude him from the benefit of the provision for the younger children, where such appeared to be the intention. And, on the other hand, an eldest daughter destitute of a provision has been considered a younger child; and an eldest son is entitled to claim a portion as a younger child, when the family estate is given from him, or he is otherwise unprovided for (a). But the only son cannot succeed to an estate limited to A. and his heirs in tail male, "except an eldest son" (b). **2855.**

PT. III. T. 15,  
CH. 1, S. 6.

Where an  
eldest  
child  
has been  
considered  
as a  
younger.

[The primary literal meaning of the words "the eldest son" is "the first-born son." The words "become the eldest son" in their natural and ordinary signification, are connected with the heirship of, and right of succession to, a living man. Thus to come within the meaning of the words of a shifting clause "become the eldest son" of a person living at the date of the will, a younger son must (unless the apparent intention of the testator requires a different construction) not only survive his elder brother and so become the eldest surviving son, but must, at the death of his father, have become his father's heir apparent. Even in a shifting clause the words "eldest" and "younger" are construed in their primary signification (c).] **2855a.**

"The eldest  
son."

"Become  
the eldest  
son."

"Begotten" will extend to the issue begotten afterwards, and the words "to be begotten" to the issue begotten before (d). **2856.**

"Begotten"  
and "to be  
begotten."

(a) 1 Rep. Leg. by White, 59, 62, 65; 2 Spence's Eq. Jur. 412, 413; 2 Jarm. Wills, 2nd ed. 167—169; *Lyddon v. Ellison*, 19 Beav. 565; *Macoubrey v. Jones*, 21 Beav. 684; *Sandeman v. Mackenzie*, 1 Johns. & Hem. 613; *Ellerde v. Thomas*, 1 D. J. & S. 18; *Davies v. Huguenin*, 1 Hem. & Mill. 730; *Wood v. Wood*, L. R. 4 Eq. 48, 55; *Collingwood v. Collingwood*, L. R. 4 H. L.

48; *In re Bayley's Settlement*, L. R. 9 Eq. 491; 6 Ch. Ap. 590.

(b) *Tuite v. Bermingham*, L. R. 7 H. L. 634.

(c) *Bathurst v. Errington*, L. R. 2 App. Cas. 698; *Meredith v. Treffry*, L. R. 12 Ch. D. 170.

(d) 2 Rep. Leg. by White, 1513; 2 Jarm. Wills, 2nd ed. 150, 152, 153.

Pr. III.T.15,  
CH. 1, s. 8.

"Next  
surviving  
son,  
daughter,  
or child."

Direction  
that  
daughters'  
shares  
should be  
settled  
upon them-  
selves  
strictly.

Where several sons, daughters, or children are spoken of, and the words "next surviving" are used, it should be specified whether next younger or next elder is meant (a). 2857.

Where a testator directed that his daughters' shares should be "settled upon themselves strictly," it was held that the income of the share of each should, during the joint lives of herself and her husband, be paid to her for life, without power of anticipation; that if she should die in the lifetime of her husband, then her share should go as she should by will appoint; and, in default of appointment, to her next of kin, exclusively of her husband; and that if she should survive her husband, then the share should belong to her absolutely (b). 2858.

#### IV. *Devisees or Bequests to Issue or Offspring.*

The word issue is used sometimes to denote all descendants, and at other times immediate descendants or some particular class of descendants living at a given time. And, in a will, issue is either a word of purchase or of limitation, as will best answer the intention of the deviser, though, in the case of a deed, it is universally a word of purchase (c). 2859.

When used as a word of purchase, and unconfined by any indication of intention, it will comprise all persons who can claim as descendants from or through the person to whose issue a devise or bequest is made (d). 2860.

It may be used in different senses in the same will. But if in the first part of a will it is used equivocally,

(a) See *Eastwood v. Lockwood*, L. R. 3 Eq. 487.

(b) *Loch v. Bagley*, L. R. 4 Eq. 122.

(c) 2 Jarm. Wills, 2nd ed. 80—4; L. C. J. *Wilmot*, in *Roe v. Grew*, 2 Wils. 322; and Lord *Kenyon*, C. J., in *Doe d. Cooper v. Collis*, 4

D. & E. 4.

(d) 1 Rep. Leg. by White, 94; *Leigh v. Norbury*, 13 Ves. 344; *Maddock v. Legg*, 25 Beav. 531; remarks of M. R. in *Rhodes v. Rhodes*, 27 Beav. 416; *McGregor v. McGregor*, 1 D. F. & J. 63.



and there is nothing in the immediate context to aid in construing its meaning, but in another part of the same will the ambiguity is corrected and the word is used in a particular sense, the presumption is that the testator has always used it in that sense in which he himself has corrected the ambiguity (a). **2861.**

“Issue male” means issue claiming through males, even in a bequest of personalty to issue male (b). **2862.**

The word “offspring” is a word of similar effect to the word “issue” (c). **2863.**

#### V. *Devisees to Heirs or Descendants.*

It is not unusual for testators, whose wills are not made by lawyers, to use the word “heirs” as synonymous with “children,” or next of kin who are descendants, or statutory next of kin: and where this appears to be the case, that meaning will be given to the word (d). **2864.**

[A gift of personalty to the heirs or next of kin of a deceased person is a gift to one class, and not an alternative gift; and it is held to be a gift to his next of kin according to the Statute of Distributions, for, as regards personal estate, the word heirs is interpreted to signify statutory next of kin (e).] **2864a.**

A devise in remainder to the right heirs of the testator for ever, his son excepted, is void (f). **2865.**

A devise to the right heirs of husband and wife is a devise to the person answering the description of heir to both, namely, a child of both, inasmuch as husband and wife are considered in law as but one person (g). **2866.**

(a) *Edwards v. Edwards*, 12 259; *In re Jeaffreson's Trusts*, L. R. Beav. 100; *Re Corrie's Will*, 32 2 Eq. 276; *In re Philips' Will*, L. R. Beav. 426. 7 Eq. 151; *Finlason v. Tatlock*,

(b) *Lynwood v. Kimber*, 29 Beav. 38. L. R. 9 Eq. 258.

(c) *Young v. Davies*, 2 Dr. & L. R. 9 Ch. D. 607. Sm. 167.

(d) *Roberts v. Edwards*, 33 Beav. (f) 6 Cruise T. 38, c. 10, § 40.

(g) 6 Cruise T. 38, c. 10, § 39.

Pr. III.T.15,  
CH. 1, s. 6.

The next  
heir.

Where a testator devises real estate to a person and his wife for their lives, and after their decease to their son, his heirs and assigns, for ever, but in case he should not survive his parents, and should die without an heir lawfully begotten, then to "the next heir" of the first takers, "their heirs and assigns for ever"; "the next heir" means the person who should be the heir of the first takers in the technical sense of the word heir: so that, under the limitation over to the next heir, the estate will not vest in a second son of the first takers dying in the lifetime of one of such first takers, but will vest in his son, as he became the next heir in the technical sense of the word (a). 2867.

Heirs male  
of the de-  
visor.

A devise to "the heirs male" of the deviser only extends to the heirs male of his body, and not to a collateral heir: so that if the deviser has not an heir male of his body, the devise is void (b). 2868.

First male  
heir of the  
branch of  
A.'s family.

The expression, "the first male heir of the branch of A.'s family," is not a definite and safe designation, but is one which may lead to perplexing questions, if not to the total failure of the estate intended to be limited, on the ground of uncertainty. For, under some circumstances, it may be a matter of the most perplexing doubt whether the person intended must be an heir in the strict technical sense, by being the child of a deceased parent and heir general, or whether it is sufficient if he is the child of a deceased person though not heir general, or whether "male heir" does not mean "male heir apparent" or "male descendant," and whether the word "first" refers to the seniority of the heir, or whether it refers to seniority and priority of the stock from which he springs, or whether the devise is not void for uncertainty. Thus where A. has no son, but several daughters, who have issue, it may

(a) *Doe d. Knight v. Chaffey*,  
16 M. & W. 656.

(b) 6 Cruise T. 38, c. 10, § 37.

be doubted whether the son or grandson of the eldest daughter is to take, because the eldest daughter has for some purposes priority over the others; or whether the son of a younger or even of the youngest daughter should take, on the ground that he was born before the children of the other daughter; or whether a son of a younger or even of the youngest daughter is to take, because his mother is dead at the time of the determination of the particular estate, while the other daughters are living, so that he is technically heir to her, while the children of the other daughters are not technically heirs to them; or whether the devise is not void for uncertainty (a). Such cases are only mentioned to illustrate the care that is necessary in the use of the word "heir." **2869.**

Pr. III.T.15,  
Ch. 1, s. 6.

In limitations in tail, "the eldest male lineal descendant of A." means eldest in line, not eldest in years, so as to designate a grandson of A.'s eldest son as the eldest in line, rather than a son of A.'s youngest son, as the eldest in years (b). **2870.**

Eldest male  
lineal de-  
scendant.

In giving property to "male descendants," or to "issue male," it is expedient to express whether or not the testator means persons claiming through males only (c). **2871.**

Male de-  
scendants.

A sister of the testator may be entitled under the description of his "nearest of kin in the male line," in preference to a son of the testator's paternal uncle (d). **2872.**

Nearest  
of kin in  
the male  
line.

Under a limitation of lands of gavelkind or borough-English tenure to the heir or heirs as a purchaser or purchasers, the common law heir takes, and not the heir by the custom. And the same rule applies in the case

Limitation  
of gavelkind  
or borough-  
English  
land or per-  
sonalty to  
the heir.

(a) *Winter v. Perratt*, 9 Cl. & F. 606. & Cr. 559; *Lambert v. Peyton*, 8 H. L. Cas. 1.

(b) *Thellusson v. Rendlesham*, 7 H. L. Cas. 429. (d) *Boys v. Bradley*, 10 Hare 389; 4 D. M. & G. 48; S. C. nom.

(c) See *Bernal v. Bernal*, 3 My. *Sayer v. Bradley*, 5 H. L. Cas. 874.

PT. III. T. 15,  
CH. 1, S. 6.

of chattels real or other personal estate, where the word heir is used in its technical sense (a). 2873.

"In the character of the then heir male of the body."

If it appear from the context that the words "in the character of the then heir male of the body" of the tenant for life, have been used to denote a person taking by purchase as first tenant in tail after the determination of the estate for life, the words will receive that construction. But that is not the technical or proper meaning of those words (b). 2874.

### VI. *Bequests to a Person and his Heirs, or to the Heirs of a Person.*

A legacy to a person and his heirs, or to a person "or his heirs or assigns," is a bequest of the entire interest to him absolutely. But when money is bequeathed to the heirs of a person to whom no interest in it is given, or when money is bequeathed to a person with a limitation to his heirs by way of substitution or remainder, in some cases it is held that by the word "heirs," the testator means the persons who under the Statute of Distributions would be entitled, in case the individual whose heirs are spoken of had died intestate; in which case it would include even his widow, and not merely his nearest of blood. In other cases it is held to mean "his children"; and in others the strict literal meaning is given to it (c). And the ordinary elementary rule of construction of any word in a will is, that such word must receive its ordinary

(a) Co. Litt. 10 a, n. (4); *Thorp v. Owen*, 2 S. & G. 90; *Sladen v. Sladen*, 2 Johns. & Hem. 369; *Polley v. Polley* (No. 2), 31 Beav. 363; *Garland v. Beverley*, L. R. 9 Ch. D. 213.

(b) *Micklethwait v. Micklethwait*, 4 Com. B. 790.

(c) See 1 Rep. Leg. by White, 88, 89, 90, 93; 2 Jarm. Wills, 2nd ed. 65—9; *In re Walton's Estate*,

8 D. M. & G. 173; *Doddy v. Higgins*, 9 Hare. App. p. xxxv.; 2 K. & J. 729; *De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 524, 557; *Re Roots*, 1 Dr. & Sm. 228; *Haslewood v. Green*, 28 Beav. 1; *Hamilton v. Mills*, 29 Beav. 193; *In re Newton's Trusts*, L. R. 4 Eq. 171; *Parsons v. Parsons*, L. R. 8 Eq. 260; *In re Stevens' Trusts*, L. R. 15 Eq. 110.

and primary interpretation, unless the Court is satisfied that the testator intended to use it in a secondary and less proper sense. So that in this case, the words "lawful heir or heirs" mean a bequest of personal estate in remainder to the right heirs of the children in the primary sense of the term, as if it were a gift of realty to them (a). **2875.**

Pr. III.T.15,  
CH. 1, s. 6.

VII. *Devisees or Bequests to Nephews and Nieces, Cousins, or Relations, or a Family, or Next of Kin, or Persons claiming under the Statute of Distributions, or Trustees, Executors, or Personal or Legal Representatives.*

Where a bequest is made to "cousins" simpliciter, first cousins only will be entitled, unless there is anything in the will to indicate a different intention (b). **2876.**

Gifts to  
cousins.

Under a bequest to the testator's first and second cousins sometimes only first or second cousins strictly and properly so called have been included; but in other cases the children or grandchildren of first cousins, commonly called first cousins once or twice removed, and often called second cousins, have also been included; at least where there were no real second cousins, but several first cousins once removed (c). **2877.**

Nephews and nieces of the wife of a testator or of the husband of a testatrix will take under a bequest to his or her nephews and nieces, where he or she has none of his or her own (d), and evidence that they were not intended is inadmissible. And they may take by name,

Nephews  
and nieces.

(a) *Smith v. Butcher*, L. R. 10 Ch. D. 113.

(b) *Stoddard v. Nelson*, 6 D. M. & G. 68; *Stevenson v. Abingdon*, 31 Beav. 305.

(c) 1 *Rop. Leg.* by White, 145; 2 *Jarm. Wills*, 2nd ed. 125; 2 *Williams on Executors*, 6th ed. 1029; *Sanderson v. Bayley*, 4 My.

& Cr. 56; *In re Parker, Bentham v. Wilson*, L. R. 15 Ch. D. 528; 17 Ch. D. (Ap.) 262; *In re Bonner, Tucker v. Good*, L. R. 19 Ch. D. 201.

(d) *Hogg v. Cook*, 32 Beav. 641; *Sherratt v. Mountford*, L. R. 15 Eq. 305; 8 Ch. Ap. 928; *Wells v. Wells*, L. R. 18 Eq. 504.

PT. III. T. 15,  
CH. 1, s. 6.

and under the designation of nephews and nieces, where it appears from the circumstances it was intended they should take, even though there be nephews and nieces of the testator himself or testatrix herself of the same name (a). 2878.

Great-nephews  
and nieces.

Great-nephews and nieces may take under the designation of nephews and nieces, if the intention is apparent (b). 2879.

Relations,  
and family.

Where a devise or bequest is made to "relations" or "near relations," and there is nothing to show that more remote relations or that some only of the relations were intended, all of those and none but those are entitled, per capita, who, in case of intestacy, could claim as next of kin by the Statute of Distributions. This construction is adopted as the best mode of setting bounds to the generality of the word "relations." But where a testator gives property to be distributed "to his relatives as the law directs," it will be divided under the Statute of Distributions per stirpes, and in such a case, if the words "share and share alike" are used, they will be disregarded. If the bequest is confined to the testator's "poor" or "necessitous" or "poorest" or "most necessitous" relations, those only will take who could claim by the Statute of Distributions, and are also in want of assistance. But when it appears from the will that a testator intended to appropriate a sum of money, not only for his *then* existing poor relations, but for those to succeed without limitation as to time, a Court of Equity will support the bequest as a charity, and admit all his poor relations without regard to the Statute of Distributions (c). When a testator has delegated a power to

(a) *Grant v. Grant*, L. R. 2 Prob. 104, 105, 107, 112, 113; 2 Jarm. & M. 8; 5 C. P. 380; *Id.* (Ex. Ch.) 727. Wills, 2nd ed. 97, 98, 100, 101;

(b) *In re Blower's Trusts*, L. R. 6 Ch. Ap. 351. *Tiffin v. Longman*, 15 Beav. 275; 2 Sugd. Pow. 237; *Fielden v. Ash-*

(c) 1 Rep. Leg. by White, 101, *worth*, L. R. 20 Eq. 410.

distribute the fund among his relations according to the discretion of the donee of the power, he may distribute the property among the testator's kindred, although they be not within the Statute of Distributions. And if such a power is not executed, the property will go to the next of kin at the death of the donee of the power (a). And where a person is empowered to fix the amount of the shares to be taken by relations, but not to select the objects, those will be entitled who are the next of kin according to the Statute of Distributions, at the death of the donee of the power (b). And bequests to a person's "family" are to be construed by the same rules as bequests to "relations" (c). **2880.**

Pr. III.T.15,  
Ch. 1, s. 6.

In the absence of indications to the contrary, "relations" will only apply to legitimate blood relations, and not to relatives by affinity or illegitimate relatives, though the latter be described in a previous part of the will as "nephews" or "nieces" (d). **2881.**

The words "children or their families" may mean "children or their children," or "children or their descendants" (e). But the primary meaning of the "family" of A. is "the children" of A. (if he has any), as distinguished from other descendants (f). **2882.**

Where a testator uses in an ultimate limitation the words "next of kin of my own family," they mean the nearest or next of kin of those persons who according to ordinary language are his family; as, for instance, the next of kin of his daughter, where he had an only daughter (g). The expression next of kin, uncontrolled

Next of kin  
and persons  
entitled  
under the  
Statute of  
Distribu-  
tions.

(a) 1 Rep. Leg. by White, 107, 108, 110.

(b) *Finch v. Hollingsworth*, 21 Beav. 112; and *Pope v. Whitcombe*, as there corrected, and not as reported 3 Meriv. 689; *Salisbury v. Denton*, 3 K. & J. 529, 536.

(c) 1 Rep. Leg. by White, 141; see *supra*, n. (b).

(d) *Hibbert v. Hibbert*, L. R. 15 Eq. 372.

(e) *Burt v. Hellyar*, L. R. 14 Eq. 160.

(f) *Pigg v. Clarke*, L. R. 3 Ch. D. 672.

(g) *Clapton v. Bulmer*, 10 Sim. 426; 5 My. & Cr. 108.

PT. III.T.15,  
CH. 1, s. 6.

by any other expression, does not mean "those persons who in case of intestacy would be entitled under the Statute of Distributions," but it means those persons (without any distinction between the whole and the half blood) who are nearest in degree of personal propinquity. And therefore, on the one hand, it excludes the children of the deceased brother or sister, where there is a brother or sister living; and on the other hand, it includes the parents as well as the children of the person named, as being all related to him in the first degree, or the brothers as well as the grandchildren of such person, as being all related in the second degree (*a*). **2883.**

A widow, as such, cannot take under a limitation to the next of kin of her husband according to the Statute of Distributions (*b*). And the husband is not a person entitled under that statute to the personal estate of his deceased wife; for his right is independent of any statute: and therefore under a bequest "in trust for the person or persons who would at the time of the decease of a daughter or daughters, or of the decease or failure of her or their children respectively (whichever event should last happen), be entitled, as next of kin or otherwise, to the personal estate of such daughter or daughters respectively under the statutes made for the distribution of intestates' effects," the husbands of the daughters are not entitled (*c*). **2884.**

Where a bequest is made to such of the testator's next of kin as would by virtue of the Statute of Distributions have been entitled in case of his intestacy, or to such persons as should be his next of kin "under or according

(*a*) *Withy v. Mangles*, 4 Beav. 358; 10 Cl. & F. 215; 2 Jarm. Wills, 2nd ed. 84—6, 100; *Cooper v. Denison*, 13 Sim. 290; *Elmsley v. Young*, 2 My. & K. 82, 780; *Arison v. Simpson*, 1 Johns. 43.

(*b*) 2 Jarm. Wills, 2nd ed. 86<sup>1</sup>;

*Cholmondeley v. Lord Ashburton*, 6 Beav. 86.

(*c*) 2 Jarm. Wills, 2nd ed. 86, 100; *Milne v. Gilbert*, 2 D. M. & G. 715; 6 D. M. & G. 510. See *supra*, par. 1406—1420.



to the statute," the reference to the statute points out not only the class but also the manner in which they are to take; so that the class take as tenants in common and not as joint tenants (a). **2885.**

When bequests are made to individuals in the character of trustees, and not as marks of personal regard only, the legacies are held to be given upon an implied condition that such persons clothe themselves with that character (b). A legacy given by a person to the executor of his will, though given to him by name, is (in the absence of any indication of bounty towards him, irrespective of that office) *prima facie* given to him as executor, and as a remuneration or acknowledgment for his trouble; and if he does not prove the will nor act at all, he will not be entitled to his legacy (d), even though he may have been physically incapable of so doing (e). **2886.**

A gift to "the executors of A." (some other person than the testator), is a gift to A.'s legal personal representative, as a part of A.'s personal estate (f). **2887.**

The ordinary legal meaning of each of the terms "representatives," "legal representatives," and "personal representatives," as well as the term "legal personal representatives," when used with respect to personalty, is not children or next of kin, but executors and administrators. And that is the sense in which the testator must be considered to have used these terms, unless the will affords evidence sufficient to satisfy the Court that he intended to use them in a different sense (g), as

(a) *Downes v. Bullock*, 25 Beav. 54; *Bullock v. Downes*, 9 H. L. C. 1; *In re Ranking's Settlement Trusts*, L. R. 6 Eq. 601.

(b) 1 *Rop. Leg.* by White, 777.

(c) See *infra*, par. 3083, 3084.

(d) 1 *Rop. Leg.* by White, 780; *Calvert v. Sebbon*, 4 Beav. 222; *Re Denby*, 3 D. F. & J. 350; *Bubb v. Yelverton*, L. R. 13 Eq. 131.

(e) 1 *Rop. Leg.* by White, 777, 780; *Hanbury v. Spooner*, 5 Beav. 630; *Re Hawkin's Trusts*, 33 Beav. 570; *Slaney v. Watney*, L. R. 2 Eq. 418; *Lewis v. Mathews*, L. R. 8 Eq. 277; *Jewis v. Lawrence*, L. R. 8 Eq. 345.

(f) *Trethewy v. Helyar*, L. R. 4 Ch. D. 53.

(g) 2 *Jarm. Wills*, 2nd ed. 91;

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Ch. 1, s. 6.

Trustees.

Executors  
(c).

Representatives.

Pr. III.T.15,  
CH. 1, s. 6.

where they are connected with the Statute of Distributions (a), or where the words "per stirpes and not per capita," are added (b), or where the word "next" is prefixed to the words "legal representatives" (c); or "personal representatives" (d), where the words "share and share alike" are added to those words (e); or where the testator frequently uses the very words "executors and administrators" in other passages, where he intended to designate them (f) or where the legacy or gift is immediate, as to A. or his representatives (g); and not after a previous life estate (h). Under an ultimate limitation to the "next legal representatives" of a person, the property does not pass to his executors or administrators, either beneficially, or otherwise, but to the person or persons who, in case of intestacy, would under the Statute of Distributions, in right of consanguinity, take his personal estate beneficially, whether such person or persons be next by personal proximity of relationship or next by representation (i). The words "to or amongst such person or persons as would be

*Kilner v. Leach*, 10 Beav. 362; *Smith v. Barnaby*, 2 Coll. 728; *Minter v. Wraith*, 13 Sim. 52; 1 Rop. Leg. by White, 124, 128; *In re Cranford's Trusts*, 2 Drew. 237, 239; *Saberton v. Skeels*, Tambl. 383; 1 R. & M. 587; *Atherton v. Crowther*, 19 Beav. 448; *Re Henderson*, 28 Beav. 657; *Chapman v. Chapman*, 33 Beav. 557; *Re Turner*, 2 Dr. & Sm. 501; *In re Wyndham's Trusts*, L. R. 1 Eq. 290; *Alger v. Parrott*, L. R. 3 Eq. 328. In *Dixon v. Dixon*, 24 Beav. 129, the same construction was adopted in the case of a residue of real and personal estate.

(a) *Holloway v. Radcliffe*, 23 Beav. 163.

(b) *Atherton v. Crowther*, 19 Beav. 448.

(c) *Booth v. Vicars*, 1 Coll. 6.

(d) *Stockdale v. Nicholson*, L. R. 4 Eq. 359.

(e) *Smith v. Palmer*, 7 Hare 225; *King v. Cleaveland*, 26 Beav. 26; 4 D. & J. 477. But see *Chapman v. Chapman*, 33 Beav. 556.

(f) *Walker v. Marquis of Camden*, 16 Sim. 329; *King v. Cleaveland*, 26 Beav. 26; 4 D. & J. 477, 488. But see *Hinchcliffe v. Westwood*, 2 De G. & S. 216.

(g) *Bridge v. Abbott*, 2 Bro. C. C. 224; *Cotton v. Cotton*, 2 Beav. 67.

(h) Judgment of V.-C. Kindersley, *In re Cranford's Trusts*, 2 Drew. 240—3.

(i) *Booth v. Vicars*, 1 Coll. 6. See also *Smith v. Palmer*, 7 Hare 225.

the personal representatives" (a), or the words, "in a due course of administration" (b), are inapplicable to executors or administrators, and denote next of kin. The full expression commonly employed, and the most unequivocal expression to designate executors or administrators, is "legal personal representatives." But the words "legal" and "personal" are not essential to the designation when applied to personal property. The word "legal," when added to representatives, only means the representatives recognised by law; and the word "personal," when added to representatives, only denotes the representatives in respect of personal property (c). **2888.**

PT. III. T. 15,  
CH. 1, S. 6.

### VIII. *Testamentary Gifts to other Objects.*

The circumstance of a solicitor preparing for a client a will containing dispositions in favour of the solicitor, does not of itself take away the right of the solicitor to be a devisee or legatee for his own benefit (d). **2889.**

Gifts to the  
solicitor of  
the testator.

A bequest to a parish church is a gift to the church-wardens of the parish named, to be applied in adorning and repairing the church, and not to the parson. A bequest to "the parish," without saying to what use, has been construed a bequest to the poor of the parish (e). **2890.**

Gifts to the  
parish or  
parish  
church.

An undischarged bankrupt may be a legatee, but the beneficial interest will belong to his trustees in trust for his creditors (f). **2891.**

Gift to a  
bankrupt.

A bequest of a year's wages to each of the testator's

Gifts to  
servants.

(a) *Baines v. Ottey*, 1 My. & K. 465; *In re Grylls' Trusts*, L. R. 6 Eq. 589. But see *In re Best's Settlement Trusts*, L. R. 18 Eq. 686.

(b) *Briggs v. Upton*, L. R. 7 Ch. Ap. 376.

(c) *In re Cramford's Trusts*, 2 Drew. 235.

(d) *Hindson v. Weatherill*, 5 D. M. & G. 301; *Walker v. Smith*, 29 Beav. 394.

(e) 2 Rop. Leg. by White, 1495. As to charitable bequests, see supra, par. 739 et seq.

(f) 1 Rop. Leg. by White, 29.

PT. III. T. 15,  
CH. 1, s. 6.

servants, over and above what may be due to them at the time of his decease, applies to such family servants only as are usually hired by the year, and not to an under-gardener, who, though he had worked for the testator for some years, had received weekly wages, and had not resided in the house (a). And where a testator gives to each person, as a servant in his domestic establishment at the time of his decease, a year's wages beyond what may be due for wages, a head-gardener who lives in one of the testator's cottages, and was not boarded by the testator, is not entitled to a year's wages. The expression "servant in my domestic establishment," in such a case, denotes an indoor servant (b).

2892.

## SECTION VII.

### *Of Implied Devises and Bequests.*

PT. III. T. 15,  
CH. 1, s. 7.

In many cases a devise or bequest may be made by plain implication as well as by express words (c). And by plain implication is meant, not merely a probable intention, but so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be reasonably supposed (d). For example, in cases where a fund has been given upon trust for a person until the age of twenty-one or marriage, without any further bequest, or where a fund or a provision or partial interest out of a fund has been given to a person until he attain twenty-one or marry, with a limitation over if that event should not happen, but with no further bequest in case the event should happen, a bequest on that event has been implied. And so, where a fund is

(a) 11 Jarm. & Byth. by Sweet, 505; *Booth v. Dean*, 1 My. & K. 560; *Blackwell v. Pennant*, 9 Hare 551.

(b) *Ogle v. Morgan*, 1 D. M. & G. 359.

(c) *In re Blake's Trust*, L. R. 3 Eq. 799.

(d) 6 Cruise T. 38, c. 10, § 18; 1 Rop. Leg. by White, 1439; *Sweeting v. Prideaux*, L. R. 2 Ch. D. 413.

directed to be paid to an individual, for the purpose of making a partial application for the benefit of a third person, and there is no express gift of the surplus, the legatee takes the fund absolutely, subject to the trust for the partial purpose specified (a). **2892a.**

PT. III. T. 15,  
CH. 1, s. 7.

The application of the doctrine of implied gifts is often very difficult; for there are cases in which the Courts have refused to hold that a gift was implied, where there appeared to be strong grounds for such a construction. Thus it has been held that where a bequest, even though it be a residuary bequest, is made to a person, but if he should die in the lifetime of the testator without leaving children, then to another person, such children take nothing by implication (b). And where an estate is devised to a person (who is not the heir at law of the devisor) after the death of the devisor's wife, the wife does not take an estate for life by implication, because the testator may have intended that the estate should descend to his heir at law until the death of his wife (c). But where a man devised his goods to his wife, and that after her decease his son and heir should have a certain house, it was determined that this was a good devise of the house to the wife for life by implication; for by the express words of the will the heir was not to take it till after the death of the wife; so that if she did not take it, no one else could (d). **2893.**

## SECTION VIII.

### *Of the Revocation of Devises and Bequests.*

Although a person should declare his will to be irrevocable in the strongest terms, yet he may revoke it, because

PT. III. T. 15,  
CH. 1, s. 8.  
Will cannot

(a) See 2 Rep. Leg. by White, 1439—1450.

see also *Neighbour v. Thurlow*, 28 Beav. 33.

(b) *Addison v. Busk*, 14 Beav. 459; 2 D. M. & G. 810. See also *Sparks v. Restall*, 24 Beav. 218;

(c) 6 Cruise T. 38, c. 10, § 20.

(d) 6 Cruise T. 38, c. 10, § 19.

PT. III. T. 15, CH. 1, s. 8. his own acts or words cannot alter the disposition of the law, so as to make that irrevocable which in its own nature is revocable (a). **2894.**

be made  
irrevocable.

### I. *Revocation under the Old Law.*

Enactments  
of the  
Statute of  
Frauds as to  
revocation.

By s. 6 of the Statute of Frauds, 29 Car. 2, c. 3, it is enacted, "that no devise in writing of lands, tenements, or hereditaments, nor any clause thereof, shall be revocable otherwise than by some other will or codicil in writing or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence and by his directions and consent; but all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, cancelled, torn, or obliterated by the testator or his directions, in the manner aforesaid, or unless the same be altered by some other will or codicil in writing or other writing of the devisor signed in the presence of three or four witnesses, declaring the same; any former law or usage to the contrary notwithstanding" (b). **2895.**

By s. 22 of the same statute, it is provided "that no will in writing concerning any goods or chattels or personal estate, shall be repealed, nor shall any clause, devise, or bequest therein be altered or changed by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least" (c). **2896.**

I. Express  
revocations  
under the  
Statute of  
Frauds.

I. Under this statute there are four express modes of revoking a will of real estate. 1. The first mode is by a subsequent will duly attested according to the statute (d).

Revocation

A subsequent will operates as a revocation of a former one

(a) 6 Cruise T. 38, c. 6, § 1.  
(b) Burton, § 261.

(c) 1 Jarm. Wills, 2nd ed. 35, 140.  
(d) 6 Cruise T. 38, c. 6, § 3.

in all cases where it contains an express clause revoking all former wills, or where it makes a different and incompatible disposition. The intention of a testator to revoke his will is the circumstance which constitutes the revocation; and when that has appeared in a subsequent will, it is sufficient, though such subsequent will should not take effect from any disability of the devisee, or from being lost. Where a second will has not a clause of revocation of all former wills, and does not make any disposition inconsistent with a former will, it does not operate as a revocation of such former will, but both remain in force (a). If a subsequent testamentary paper is only partly inconsistent with one of an earlier date, the earlier instrument is only revoked as to those parts where it is inconsistent, and both of the papers are entitled to probate (b). Where a testator has made a second will different from the first, but it is not known in what that difference consisted, such second will does not revoke the former one (c). Where there is a duplicate of a will, and the testator cancels or makes an obliteration in the manuscript which is in his own possession, this generally operates as a revocation of or obliteration in the other; for it may not be in the testator's power to get possession of the other manuscript (d). 2897.

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by a subsequent will.

2. The second mode of revocation is by a codicil duly executed according to the Statute of Frauds, and containing express words of revocation, or making a different disposition from that contained in the will (e). The dispositions contained in a will or preceding codicil are not affected farther than is absolutely necessary in order

Revocation  
by a codicil.

(a) 6 Cruise T. 38, c. 6, § 4, 5, 9 ;  
1 Jarm. Wills, 2nd ed. 143, 145 ;  
*Johnson v. Lyford*, L. R. 1 Prob.  
& M. 546.

(b) *Lemage v. Goodban*, L. R. 1  
Prob. & M. 57.

(c) 6 Cruise T. 38, c. 6, § 13 ; 1  
Jarm. Wills, 2nd ed. 143.

(d) 6 Cruise T. 38, c. 6, § 39 ; 1  
Jarm. Wills, 2nd ed. 115, 116.

(e) 6 Cruise T. 38, c. 6, § 18 ;  
*Tupper v. Tupper*, 1 K. & J. 665.

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to give effect to those which are contained in the subsequent codicil. If a disposition in a will or preceding codicil is clear, it is incumbent on those who contend it is not to take effect by reason of a revocation in a subsequent codicil, to show that the intention to revoke is equally clear and free from doubt as the original intention to make such a disposition (a). Therefore a codicil revoking a will does not necessarily revoke a prior codicil (b). And a devise by will to the children of A. was held not to be revoked by parenthetical expressions in a codicil, that they were not intended to take any beneficial interest under the will or codicil, as it might refer only to the testator's view of the effect of his will, or to an intention of future revocation (c). And where A. devised the remainder in fee in her lands to her granddaughter, and by a codicil, which she directed to be annexed to and taken as part of her will, reciting her subsequent acquisition of other lands, and that she intended to dispose of all her estates for the benefit of her granddaughter "for her life, with such limitation and in such manner" as thereafter expressed, "instead of the devise contained in her will," she thereby devised her estates in trust for her granddaughter for life, and then for her children who should survive her in fee, or if no children, for her brothers and sisters who should survive her in fee, but without limiting the estates over in case of the limitations to the children and the brothers and sisters (which event happened) never taking effect; there, as it was the manifest intention, both in the will and codicil to make the granddaughter the principal object of the testatrix's bounty, it was held that the

(a) 1 Jarm. Wills, 2nd ed. 146, 151; *Cleobury v. Beckett*, 14 Beav. 586, 587; *Butler v. Greenwood*, 22 Beav. 303; *Agnew v. Pope*, 1 D. & J. 49; *Robertson v. Powell*, 2 Hurl.

& Colt. 762. Supra, par. 2801, 2801a.

(b) *Farrer v. St. Catherine's Coll.* L. R. 16 Eq. 19.

(c) *Cleobury v. Beckett*, 14 Beav. 583, 588.



words, "instead of," etc., did not amount to a revocation, but meant "instead of so much only of the devise" in the will as was incompatible with the disposition contained in the codicil; so that the gift of the remainder in fee was unaltered by the codicil (a). 2898.

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3. The third mode of revoking a will which is mentioned by the Statute of Frauds is, by a writing declaring an intention of revoking such will, signed in the presence of three witnesses. And it is observable, that the Statute of Frauds requires that in devises of lands, though not in mere revocations, the three witnesses should subscribe the will in the presence of the testator. While, on the other hand, the clause relating to revocations requires that the testator should sign in the presence of three witnesses, which was not required in devises (b). And it has been held, that, although a will may be revoked by a written declaration without being attested by three witnesses subscribing the will in the testator's presence, yet that a second will, though containing a clause revoking all former wills, shall not operate as a revocation of the first will, unless it is executed in such a manner as to operate as a devise (c). 2899.

Revocation  
by a writing  
signed in  
the presence  
of three  
witnesses.

4. The fourth mode of revoking a will which is mentioned by the Statute of Frauds is, by burning, cancelling, tearing, or obliterating the will, with the intent to revoke it (d). An obliteration or alteration of a part of a will does not operate as a revocation of the whole will, but only of the part obliterated, and the rest will remain good (e). [Thus the words "her heirs and assigns,"

Revocation  
by burning,  
cancelling,  
tearing, or  
obliterat-  
ing.

(a) *Doe d. Murch v. Marchant*, 6 M. & Gr. 813.

25—27; 1 Jarm. Wills, 109 et seq.

(b) 6 Cruise T. 38, c. 6, § 19; 1 Jarm. Wills, 2nd ed. 140—1.

(e) 6 Cruise T. 38, c. 6, § 314; 1

(c) 6 Cruise T. 38, c. 6, § 19.

Jarm. Wills, 2nd ed. 112; *Swinton v. Bailey*, L. R. 1 Ex. D. (Ap.) 110;

(d) 6 Cruise T. 38, c. 6, § 3,

4 Ap. Cas. 70.

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may be obliterated, so as to cut down the estate given to the devisee, from an estate in fee simple to an estate for life (a).] **2900.**

II. Implied  
revocations.

II. Besides the different modes of revoking a will allowed by the Statute of Frauds, there are certain alterations in the situation of the testator or in the estate devised which have been held to operate as implied revocations of a devise (b). **2901.**

Revocation  
by marriage  
and birth  
of child.

Where a man made his will, and afterwards married and had a child, these events generally operated as a revocation of his will; because they produced a complete change in the situation and in the duties of the testator. But neither of those circumstances singly (as a subsequent marriage, or the subsequent birth of a child) had that effect (c). But the will of a female was always revoked by her marriage, on the ground that it would otherwise by her own act become irrevocable, which is contrary to the nature of the instrument, though it may become so by the act of God, as by insanity supervening and continuing till death (d). **2902.**

Revocation  
by an  
alienation  
or disposi-  
tion or  
merger of  
the estate.

An actual alienation or disposition of an estate, whether legal or equitable, after a devise, generally operated as a revocation; for in such cases the alienation was deemed undoubted evidence of an alteration of intention, and in some of these cases the deviser did not die seised (e). **2903.**

Even an agreement or covenant to convey lands which had been previously devised by will, whether in execu-

(a) *Swinton v. Bailey*, L. R. 4 Ap. Cas. 70.

(b) 6 Cruise T. 38, c. 6, § 40; Burton, § 267.

(c) 6 Cruise T. 38, c. 6, § 41, 44—50; Burton, § 269; 1 Jarm. Wills, 2nd ed. 102—108; *Marston v. Roe* d. Fox, 8 Ad. & E. 14; 2 N. & P. 504; *Israell v. Rodon*, 2 Moore's

P. C. C. 51; *In the goods of Thos. Cadymold*, 1 Swa. & T. 34.

(d) Burton, § 270; 6 Cruise T. 38, c. 6, § 53; 2 Bl. Com. 498; 1 Jarm. Wills, 2nd ed. 102.

(e) 6 Cruise T. 38, c. 6, § 55; 1 Jarm. Wills, 2nd ed. 122, 124; *Grant v. Bridger*, L. R. 3 Eq. 347.

tion of a power or not, operates in equity, though not at law, as a revocation or ademption of such devise, as well in cases before the stat. 1 Vict. c. 26, as in cases within it (*a*); and the devisee is not entitled to the purchase money (*b*), even though the contract were entered into under the compulsory powers of a railway company (*c*); or though the conversion be at the option of the person with whom the agreement was entered into, and it be not exercised till after the death of the testator (*d*). In cases where the will is revoked in equity, but not at law, the legal estate passes by the will to the devisee, but a Court of Equity will compel him to convey it to the person entitled under the equitable agreement. **2904.**

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Even an intended alienation of an estate previously devised, which failed of taking effect for want of some formality, has been held to operate as a revocation of the devise. Thus a feoffment without livery and a bargain and sale not enrolled have been held to be revocations of prior devises; because such intended alienations were considered as proofs of an alteration of intention (*e*). **2905.**

An alienation to a trustee, or conveyance to a cestui que use, without any intention of parting with the estate, and though the alienor took back the whole use, has been held to operate as a revocation of a prior devise (*f*). **2906.**

Where a person who had devised his lands, afterwards levied a fine or suffered a recovery of them, these acts operated as a revocation of the devise (*g*). **2907.**

Parol evidence is not admissible to prove that the

(*a*) 6 Cruise T. 38, c. 6, § 58; 2 Sugd. Pow. 10; Sugd. Concise View, 131, 132; 1 Jarm. Wills, 2nd ed. 135; *Andrew v. Andrew*, 3 Sm. & G. 130.

(*b*) 11 Jarm. & Byth. by Sweet, 794.

(*c*) *Re Manchester and Southport Railway Comp.*, 19 Beav. 365; *Gale*

*v. Gale*, 21 Beav. 349.

(*d*) *Weeding v. Weeding*, 1 Johns. & Hem. 424.

(*e*) 6 Cruise T. 38, c. 6, § 62, 63; 1 Jarm. Wills, 2nd ed. 137—139.

(*f*) 6 Cruise T. 38, c. 6, § 65; *Burton*, § 267; 1 Jarm. Wills, 2nd ed. 124.

(*g*) 6 Cruise T. 38, c. 6, § 72; 1 Jarm. Wills, 2nd ed. 125.

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testator meant that his will should remain in force and unrevoked by the subsequent conveyance (a). 2908.

A conveyance of property contracted to be purchased, if made to the usual uses to bar dower, was held to revoke a devise of it by the purchaser, if there was no special contract that the property should be conveyed to the usual uses to bar dower, and if the devise referred exclusively to the estate which the testator then had, and did not also refer to an estate or interest which he might have at a future time; because, at the date of his will, he was equitable owner in fee under the contract, and by the conveyance he acquired a legal estate of a different character from his former equitable estate, which was the subject of the devise (b). And in such case the testator's heir, if entitled to benefits under his will, is not bound to elect between those benefits and the property so conveyed (c). 2909.

Where a man has an equitable interest in fee in an estate, and afterwards takes a conveyance of the legal estate to the same uses, this is no revocation (d). And so, where a person devises a copyhold estate, and is afterwards admitted to it, this does not operate as a revocation of the devise (e). And the mere change of a trustee does not operate as a revocation of a preceding devise (f). Nor does a partition of an estate between tenants in common operate as a revocation of a prior devise made by one of the tenants of his share, even though such a partition be corroborated by a fine (g). 2910.

(a) 6 Cruise T. 38, c. 6, § 83.

(b) 1 Jarm. Wills, 2nd ed. 130; *Plowden v. Hyde*, 2 Sim. (N. S.) 171; 2 D. M. & G. 684; *Bullin v. Fletcher*, 2 My. & Cr. 432.

(c) *Plowden v. Hyde*, 2 Sim. (N. S.) 171.

(d) 6 Cruise T. 38, c. 6, § 90; 1

Jarm. Wills, 2nd ed. 129; *Bullin v. Fletcher*, 2 My. & Cr. 432.

(e) 6 Cruise T. 38, c. 6, § 92.

(f) 6 Cruise T. 38, c. 6, § 94; 1 Jarm. Wills, 2nd ed. 129.

(g) 6 Cruise T. 38, c. 6, § 97; 6 Jarm. & Byth. by Sweet, 596; 1 Jarm. Wills, 2nd ed. 125.

Where a person has an estate pour autre vie at the time of making his will, and afterwards purchases the inheritance, it is a revocation of any devise of the estate pour autre vie (a). **2911.**

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CH. 1, s. 8.

Although a mere mortgage in fee made after the lands mortgaged were devised is a revocation of such devise at law, yet in equity it only has the effect of making the devisee take subject to the mortgage as against the mortgagee, and in cases within the stat. 17 Vict. c. 113, as against the testator's representatives (b). But if lands are devised to a person in fee, and the testator afterwards mortgages them to the devisee, it will be a revocation in toto, being inconsistent with the devise (c). **2912.**

Where the owner of an estate limited to the usual uses to bar dower mortgaged it in fee, and then devised the estate, and subsequently took a reconveyance from the mortgagee to the same uses to which it stood limited before the mortgage, and died before the Wills Act came into operation, the will was not revoked by the reconveyance, though, by the proviso for redemption, the estate was to be reconveyed to the mortgagor, his heirs, appointees, or assigns, or to such other person or persons, to such uses, and in such manner as he or they should direct; the Lords Justices, Sir J. L. Knight Bruce and Lord Cranworth (contrary to the decision of the Court below) (d), considering that, notwithstanding the form of the proviso for redemption, the mortgage deed, being executed simply for the purpose of creating a charge, did not affect the estate of the mortgagor any further than by rendering that an equitable estate which was before a legal estate; and it being clear that the mere

(a) 6 Cruise, T. 38, c. 6, § 113. Jarm. Wills, 2nd ed. 125—7.

(b) See supra, par. 1391.

(d) *Plowden v. Hyde*, 2 Sim

(c) 6 Cruise T. 38, c. 6, § 106 ; 1 (N. S.) 171.

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by the reconveyance could not operate as a revocation, if the equitable estate existing after the mortgage, was of a similar kind to the legal estate which existed before the mortgage and was brought back by the reconveyance (a). **2913.**

A conveyance, to have the effect of a total revocation of a prior devise, must be co-extensive with the disposition made by the will. For if it is only of a part of the property, it affects the will no farther than concerns that part. And if it is of a particular estate or interest only, it only operates as a revocation pro tanto. Hence a lease made of lands already devised only operates as a partial revocation or a revocation pro tanto in such a way that the devisee takes the inheritance subject to the term, with the rent, if any, reserved by the lease (b). **2914.**

A conveyance in fee to trustees merely for raising money to pay debts, will only operate as a revocation pro tanto of a prior devise, so far as relates to the payment of the debts, but no further (c). But where a person, after having made his will, executed a conveyance in trust for payment of debts in a schedule, and instead of declaring the uses to himself in fee after payment of the debts, he declared that the trustees should convey to such uses and purposes as he by deed or will should appoint, and for default of appointment to himself in fee, this was held to be a revocation (d). **2915.**

A surrender of a lease for lives and the taking a new lease was held to operate as a revocation of a prior devise of it (e). **2916.**

(a) *Plowden v. Hyde*, 2 D. M. & G. 684.

(b) 6 Cruise T. 38, c. 6, § 134; 1 Jarm. Wills, 2nd ed. 122.

(c) 6 Cruise T. 38, c. 6, § 107; 1 Jarm. Wills, 2nd ed. 126.

(d) 6 Cruise T. 38, c. 6, § 109.

(e) 6 Cruise T. 38, c. 6, § 111.

And where a testator bequeathed a term for years, and afterwards surrendered it and took a new term, it was held that this operated as a revocation or ademption of the bequest. If however the words of the will show the testator's intention to dispose of all terms for years whereof he might die possessed, a renewed term would pass; for a term of years being only a chattel, there was no necessity for a possession at the date of the will, or of a continuance of such possession till the testator's death (a). **2917.**

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A devise is revoked by a bankruptcy, so far only as may be necessary for the purpose of paying the creditors (b). **2918.**

Revocation  
by bank-  
ruptcy.

The republication of a former will revoked one of later date, and established the first again (c). **2919.**

Revocation  
by republi-  
cation of a  
former will.

## II. *The Law as to Revocation by the Stat. 1 Vict. c. 26.*

By s. 18, "every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, customary heir, executor, administrator, or the person entitled as his or her next of kin, under the Statute of Distributions)" (d). **2920.**

Will to be  
revoked by  
marriage.

By s. 19, "no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances." **2921.**

No will to  
be revoked  
by presump-  
tion.

By s. 20, "no will or codicil, or any part thereof shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is

No will to  
be revoked  
but by  
another will  
or codicil,  
or by a  
writing  
executed  
like a will,  
or by  
destruction.

(a) 6 Cruise T. 38, c. 6, § 114, 116.

(c) 2 Bl. Com. 502.

(b) See 6 Cruise T. 38, c. 6, § 110;  
1 Jarm. Wills, 2nd ed. 127.

(d) *In the goods of Fenwick*, L. R.  
1 Prob. & M. 319.

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CH. 1, s. 8.

hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same " (a). 2922.

A codicil, even though it refer to and incorporate by reference some of the provisions of a will, may be admitted to probate, though the will be destroyed with the intention of revoking it (b). 2922a.

Where a will is torn up under a false impression that it is not valid, it is not revoked thereby (c). 2923.

A devise  
not to be  
rendered  
inoperative  
by any  
subsequent  
conveyance  
or act,  
except, etc.

By s. 23, "no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death." 2924.

This section does not apply to conveyances or contracts whereby the testator has entirely and effectually parted with the property, at law or in equity (d). 2925.

## SECTION IX.

### *Of the Lapse of Devises and Bequests.*

PT. III. T. 15,  
CH. 1, s. 9.

General  
rule.

With the exceptions noticed below, a devise or bequest lapses, that is, fails, by the death of the devisee or legatee in the lifetime of the testator (e). And though the devise be to a person and his heirs, yet if he die before the testator, his heirs will not take the land; because the mention of the heirs only denotes what

(a) See page 1153.

(b) *In the goods of Turner*, L. R. 2 Prob. & M. 403.

(c) *Giles v. Warren*, L. R. 2 Prob. & M. 401.

(d) See supra, par. 2903; *Ford v. De Pontès*, 30 Beav. 572.

(e) 1 Rep. Leg. by White, 463; Burton, § 275; 1 Jarm. Wills, 2nd ed. 277.



estate he himself should take, viz., a fee simple, if he were living at the time when the will must take effect (a). And so, although a legacy be given to a person, his executors or administrators or personal representatives, it will lapse by his death before the testator; because the additional words may have been intended merely to denote the gift of the absolute interest, or to express to the legatee, that if he should survive the testator and afterwards die before the legacy would be payable, his personal representatives should receive it (b). **2926.**

Pr. III. T. 15,  
Ch. 1, s. 9.

Where the testator releases and forgives a certain sum owing on a bond, and directs the bond to be delivered up to be cancelled, the will does not import a general release, but the benefit of the release lapses by the death of the legatee before the testator (c). **2927.**

Lapse of  
sum for-  
given.

If a devise or bequest is made to two or more persons as joint tenants, the share or shares of any one or more of them who may happen to die before the testator, or whose interest may happen to be revoked by the testator, or may be avoided by becoming an attesting witness or witnesses, will not lapse, but will go to the other joint tenant or tenants; because each joint tenant takes per mie et per tout (d). But in the case of the death of a tenant in common before the testator, or of his interest being revoked, his share will not pass to the survivor or survivors (e), unless the devise or bequest is made to the tenants in common as a class of indefinite number,

Distinctions  
in the case  
of joint  
tenants and  
tenants in  
common.

(a) Burton, § 275; 1 Jarm. Wills, 2nd ed. 277.

(b) 1 Rep. Leg. by White, 467—8; 1 Jarm. Wills, 2nd ed. 277—8; *Browne v. Hope*, L. R. 14 Eq. 343.

(c) 11 Jarm. & Byth. by Sweet, 464.

(d) 1 Pres. Shep. T. 71; 1 Rep. Leg. by White, 482; Burton, § 276;

1 Jarm. Wills, 2nd ed. 274; 2 Id. 216; *Young v. Davies*, 2 Dr. & Sm. 167; *Drakeford v. Drakeford*, 33 Beav. 43; *Fell v. Biddolph*, L. R. 10 C. P. 701.

(e) 1 Pres. Shep. T. 71; Burton, § 277; 1 Rep. Leg. by White, 485; 1 Jarm. Wills, 2nd ed. 279; 2 Id. 216.

Pr. III. T. 15,  
Ch. 1, s. 9.

and not nominatim or in words denoting the precise number of the individuals intended to take. Thus, if a devise or bequest is made to "the children of A.," i.e., to B., C., D., and E., as tenants in common, or "to the four children of A.," as tenants in common, and one of them dies in the lifetime of the testator, his share will not go to the survivors. But if a devise or bequest is made "to the children of A.," as tenants in common, and one of them dies, or the interest of one of them is revoked, his share belongs to the other or others; because the devise or bequest is made to them as a class and not as individuals (a). **2928.**

Where there is no lapse of a beneficial interest or charge, or of a sum due to creditors.

Where a legacy is given to a trustee for another person, and the trustee dies before the testator, the trustee's death does not prejudice the cestui que trust. And so if real or personal estate is devised or bequeathed to a person charged with a legacy to another, the death of the devisee or legatee before the testator will not be allowed in equity to prejudice the charge. And where a testator bequeaths a sum to creditors in discharge of debts actually due, although the legal remedy for their recovery may be gone, if one of the creditors dies in the testator's lifetime, yet his personal representatives will be entitled (b). **2929.**

To whom a lapsed estate or interest will go.

By the old law, where a devise of lands in fee simple became lapsed by the death of the devisee in the lifetime of the testator, the estate devised would not go to the residuary devisee of the real estate, but descended to

(a) See 1 Rop. Leg. by White, 485—489; 11 Jarm. & Byth. by Sweet, 527 (a); Burton, § 278; 1 Jarm. Wills, 2nd ed. 279; 2 Id. 216; *Leigh v. Leigh*, 17 Beav. 605; *Cruse v. Nowell*, 4 Drew. 215; *Fitz Roy v. Duke of Richmond* (No. 1), 27 Beav. 186; *Re Stanhope's Trusts*, 27 Beav. 201. But see *Sanders v.*

*Ashford*, 28 Beav. 913; *Browne v. Hope*, L. R. 14 Eq. 343; *Dimond v. Bostock*, L. R. 10 Ch. Ap. 358; judgment in *Fell v. Biddolph*, L. R. 10 C. P. 708, 710; *In re Coleman and Jarrom*, L. R. 4 Ch. D. 165; *In re Smith's Trusts*, L. R. 9 Ch. D. 117.

(b) 1 Rop. Leg. by White, 474—5; 1 Jarm. Wills, 2nd ed. 282.

the heir at law of the testator (*a*). But this is now altered (*b*). **2930.**

Pr. III.T.15,  
Ch. 1, s. 9.

If an estate is devised, charged with legacies which fail, the devisee shall have the benefit of them. And where an estate is devised to a mere trustee, in trust to sell and pay particular sums of money which lapse, and no disposition is made of the extra produce, those lapsed legacies will sink into the land for the benefit of the heir (*c*). **2931.**

When a bequest which is not residuary lapses, it falls into the general residue, and consequently belongs to the residuary legatee (*d*). But if a residuary bequest or a share of a residuary bequest lapses, it belongs to the testator's next of kin (*e*). **2932.**

By the stat. 1 Vict. c. 26, s. 32, "where any person to whom any real estate shall be devised for an estate tail or an estate in quasi entail shall die in the lifetime of the testator, leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will." And by s. 33, "where any person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately

Devises of  
estates tail  
shall not  
lapse.

Gifts to  
children  
or other  
issue who  
leave issue  
living at the  
testator's  
death shall  
not lapse.

(*a*) 6 Cruise T. 38, c. 8, § 35, 37; Burton, § 279; 1 Jarm. Wills, 2nd ed. 548.

(*b*) See *infra*, par. 2945.

(*c*) 1 Rep. Leg. by White, 499.

(*d*) 1 Rep. Leg. by White, 496; *Thompson v. Whitelock*, 4 D. & J. 490.

(*e*) 1 Rep. Leg. by White, 498; *Lloyd v. Lloyd*, 4 Beav. 231.

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after the death of the testator, unless a contrary intention shall appear by the will." This section does not substitute, for the predeceased devisee or legatee, the issue whose existence is the event or condition which excludes the lapse, but renders the subject of the gift the absolute property of the predeceased devisee or legatee, and therefore disposable by his will, or transmissible to his personal representatives in case of intestacy, notwithstanding his death before the death of the testator (*a*). It applies to a testamentary appointment made in exercise of a general power, as well as to an ordinary bequest (*b*). But as this section is expressly addressed to cases where, but for its provisions, lapse would ensue, it does not apply to devises or bequests to the testator's children as a class (*c*). **2933.**

## SECTION X.

### *Of the Republication of Wills.*

PR. III.T.15,  
CH. 1, S. 10.

Effect of  
republi-  
cation.

By the old law, a republication of a will has a two-fold effect : first, in general, to give it the effect of a will made at the time of its republication ; and, secondly, to set up and re-establish a will that has been revoked (*d*). **2934.**

Republica-  
tion by re-  
execution.

The first mode of republishing a will is by re-execution (*e*). **2935.**

Republica-  
tion by  
codicil.

Another mode is by a codicil duly executed. This operates as a republication of the will, so as to make it take effect from the time of the execution of the codicil. And hence, where a will, if read as speaking at the date of the execution of a codicil, contains language which would operate as an incorporation of an unattested docu-

(*a*) *Johnson v. Johnson*, 3 Hare 157 ; *Eccles v. Cheyne*, 2 K. & J. 676 ; *In the goods of Jane Parker*, 1 Swa. & Trist. 523 ; *Eager v. Furnivall*, L. R. 17 Ch. D. 115 ; *In re Hensler, Jones v. Hensler*, L. R. 19 Ch. D. 612.

(*b*) *Eccles v. Cheyne*, 2 K. & J. 676.

(*c*) *Browne v. Hammond*, 1 Johns. 210 ; *Olney v. Bates*, 3 Drewry 319.

(*d*) Burton, § 271 ; 6 Cruise T. 38, c. 7, § 1.

(*e*) 6 Cruise T. 38, c. 7, § 2 ; 1 Jarm. Wills, 2nd ed. 159.

ment to which it refers, such document, although not in existence until after the execution of the will, is entitled to probate, by force of the codicil (*a*). And hence, also even by the old law, in the absence of indication to the contrary, realty acquired after the execution of the will, and before the execution of a codicil, passed by the will, if it was specified, or if the description in the will was sufficiently general to include it (*b*). And a codicil has this effect, even though it relates to the testator's personal estate only (*c*); or only appoints a new executor (*d*). And where a testator, after having made a will before the stat. 1 Vict. c. 26, has, since that Act came into operation, executed a codicil, ratifying and confirming the will, though it was apparently made only for the purpose of appointing an additional trustee; this amounts to a republication of the will, so as to have the effect, by virtue of the stat. 1 Vict. c. 26, ss. 24, 34 (*e*), of passing real estate purchased by the testator after the date of the will, and even after the date of the codicil (*f*). But where a codicil is expressly confined to the lands devised by the will, it does not operate as a republication of such will, so as to make it pass after-purchased lands (*g*). And although a codicil confirming a will makes the will for many purposes to bear the date of the codicil, yet this is not the case where such a construction would defeat the intention of the testator. So that where a will contains a power of leasing at the ancient

PT. III. T. 15,  
CH. 1, S. 10.

(*a*) *In the goods of Lady Truro*, L. R. 1 Prob. & M. 203.

(*b*) 6 Cruise T. 38, c. 7, § 3; Sugd. Concise View, 127; Burton, § 271; 1 Jarm. Wills, 2nd ed. 159, 161, 164—5; *Hughes v. Hosking*, 11 Moo. P. C. C. 1.

(*c*) Burton, § 274; Sugd. Concise View, 127; 1 Jarm. Wills, 2nd ed. 159; *Dickinson v. Stedolph*, 11 Com. B. (N. S.) 341.

(*d*) *In re Earl's Trust*, 4 K. & J. 673.

(*e*) Supra, page 1102, n. (*b*), par. 2816, 2817.

(*f*) *Doe d. York v. Walker*, 12 M. & W. 591; *Lady Langdale v. Briggs*, 3 Sm. & G. 246.

(*g*) 6 Cruise T. 38, c. 7, § 12; *Moneypenny v. Bristow*, 2 Russ. & M. 117; 1 Jarm. Wills, 2nd ed. 161, 165.

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Ch. 1, s. 10.

accustomed rent, and a codicil is made for some special purpose wholly unconnected with the power, a lease made after the date of the will, but prior to the codicil, will not be taken into account in deciding the question what is the ancient accustomed rent (a). **2936.**

A codicil which refers to a will of a particular date, and does not refer to another codicil subsequent to that date, does not operate as a republication of that subsequent codicil (b). **2937.**

Cancelling a  
second will.

Where a person made his will, and afterwards revoked it by making another will, but did not actually cancel the first will, the cancelling of the second will operated as a republication of the first (c). **2938.**

1 Vict. c. 26,  
s. 22, as  
to revival  
of will.

By the stat. 1 Vict. c. 26, s. 22, "no will or codicil, or any part thereof, which shall be in any manner revoked shall be revived otherwise than by the re-execution thereof or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown." **2939.**

Destruction of a  
subsequent  
will which  
revokes a  
prior one.

It was held that under this section, where a subsequent will contains a clause of revocation of a prior will, such prior will is not revived merely by the destruction of the subsequent will. And parol evidence is admissible as to the contents of the second will (d). **2940.**

A will cannot now be revived by mere implication (e). **2941.**

(a) *Doe d. Biddulph v. Hole*, 15 Q. B. 848; 1 Jarm. Wills, 2nd ed. 161, 165.

(b) *Burton v. Newbery*, L. R. 1 Ch. D. 234.

(c) 6 Cruise T. 38, c. 7, § 15.

(d) *In the goods of Wm. Brown*, 1 Swa. & Tr. 32.

(e) *In the goods of Steele*, L. R. 1 Prob. & M. 575.

## CHAPTER II.

## OF DEVISES SEPARATELY CONSIDERED.

## SECTION I.

*Of Devises generally.*

THE proper and technical words of devise are "give and devise," but any other words which sufficiently show the intention of the testator to dispose of all or any part of his real estate will be sufficient for that purpose (a). **2942.**

PT. III. T. 15,  
CH. 2, s. 1.

Operative  
words of  
devise.

With respect to the words that are necessary to denote the nature of the estate or interest intended to be given by the testator to the devisee, the Courts will carry the intention of the testator into effect, if sufficiently declared, however defective the language may be (b). **2943.**

Words  
expressive  
of the  
nature of  
the interest.

Where a testator, after limiting the fee in contingency, makes a residuary devise of "all the residue and remainder of his estate and effects whatsoever and wheresoever, not thereinbefore disposed of," the fee passes under the residuary devise, and vests in the residuary devisee, until the happening of the event on which the contingent limitation in fee is to take effect (c). **2944.**

A residuary  
devise  
passing the  
fee, where  
previously  
limited in  
contingency  
only.

By the stat. 1 Vict. c. 26, s. 25, it is enacted, "that unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the

A residuary  
devise to  
include  
estates  
comprised  
in lapsed  
and void  
devises.

(a). 6 Cruise T. 38, c. 10, § 2.

(b). 6 Cruise T. 38, c. 11, § 1.

(c) *Egerton v. Massey*, 3 Com. B. 338.

Pr. III.T.15,  
CH. 2, s. 1.

death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will" (a). **2945.**

Income.

An immediate devisee in esse takes all the income accruing from the subject of gift subsequently to the testator's decease (b). **2946.**

Disclaimer.

The freehold or interest in law is in a devisee before entry (c). But he may disagree to and disclaim the devise by deed; in which case the devise becomes void, and the lands descend to the heir at law (d). **2947.**

Perpetuity.

A devise which tends to a perpetuity is void (e). **2948.**

## SECTION II.

### *Of the Description of the Parcels or Subject.*

Pr. III.T.15,  
CH. 2, s. 2.

A devise of the rents or income passes the fee simple of the land itself, both at law and in equity (f). **2949.**

Devise of  
"the rents."  
Effect of  
superadded  
words.

Where there is a correct and specific description of the property devised, a mistake in any additional words will have no effect; but where the first description is merely general, there additional words will be considered either as explanatory or restrictive, according to the intent of the testator (g). **2950.**

Where the  
word  
"estate"  
passes all

"It is established by a long course of decisions" (observed a learned judge), "that the word 'estate' or

(a) See *Springett v. Jennings*, L. R. 10 Eq. 488; 6 Ch. Ap. 333.

(b) 11 Jarm. & Byth. by Sweet, 774.

(c) Co. Litt. 111 a.

(d) 6 Cruise T. 38, c. 8, § 41.

(e) See supra, par. 882, 882a; *Attorney-General v. Greenhill*, 33 Beav. 193.

(f) 1 Jarm. Wills, 2nd ed. 681; 6 Cruise T. 38, c. 10, § 66; *Mannor*

*v. Greener*, L. R. 14 Eq. 456.

(g) 6 Cruise T. 38, c. 10, § 80. See also 1 Jarm. Wills, 2nd ed. 671—6; *Harrison v. Hyde*, 4 Hurl. & Norm. 805; *Stanley v. Stanley*, 2 Johns. & Hem. 491; *Hardwick v. Hardwick*, L. R. 16 Eq. 168; *Whitfield v. Langdale*, L. R. 1 Ch. D. 61; *Travers v. Blundell*, L. R. 6 Ch. D. (Ap.) 436.



'estates,' used in the operative part of the will, passes not only the corpus of the property, but all the interest of the testator in it, unless controlled by the context; and that superadded words of local description more applicable to the corpus of the property, indicating its situation or the nature of its occupation, do not prevent it from passing the whole interest. Nor do words apparently explanatory of the meaning of the term, inserted in the devise itself; as where the testator leaves his real estate, *that is*, his land and buildings situate at A. (a), or his freehold estate, *consisting of* thirty acres of land (b) . . . But where the word 'estate' is not used in the operative clause of the devise itself, but is introduced into another part of the will referring to it, we find no decision or dictum authorizing us to construe it as having the effect of extending the meaning of the operative clause, whether prior or subsequent, and to read the will, as if the testator had said, by the devise of lands in another clause, 'I mean to give my estate in these lands' (c). **2951.**

Pr. III.T.15,  
CH. 2, s. 2.

the interest  
of the  
testator.

Sometimes the word "estate" or "property," though apparently applicable to personalty alone, has been held also to apply to real property; as where the word devise is not used, and there are no words of limitation to the heirs (d). Indeed, the word "estate," by its own proper force, without any proof aliunde of an intent to aid the construction, carries the realty as well as personalty, and

Where the  
word  
"estate"  
applies to  
realty.

(a) *Denn d. Richardson v. Hood*, 7 Taunt. 35.

(b) *Gardner v. Harding*, 3 J. B. Moore, 565; 1 B. & B. 72.

(c) *Pollock*, L. C. B., in *Doe d. Burton v. White*, 1 Exch. 534. The decision in this case was affirmed by the Exchequer Chamber, 2 Exch. 797. See also 6 Cruise T. 38, c. 10, § 62, and *supra* par. 377.

(d) 1 Jarm. Wills, 2nd ed. 613—

633; *D'Almaine v. Moseley*, 1 Drew. 629; *Patterson v. Huddart*, 17 Beav. 210; *Re Greenwich Hospital Improvement Act*, 20 Beav. 458. See also *Sanderson v. Dobson*, 1 Exch. 141; S. C. 7 Com. B. 81; *Streatfeild v. Cooper*, 27 Beav. 338; *Morris v. Lloyd*, 3 Hurl. & Colt. 141; *Hamilton v. Buckmaster*, L. R. 3 Eq. 323; *Dobson v. Bonness*, L. R. 5 Eq. 404.

**Pr. III.T.15,** is not to be restrained to personalty only, unless there is a  
**Oh. 2, s. 2.** clear intent so to restrain it, to be gathered either from the whole will or from the way in which the word is used in that particular part of the will where the contested use of it arises (a). **2952.**

Where "real estate" includes leaseholds.

Leaseholds will not pass under a general devise of "real estate" before the stat. 1 Vict. c. 26, s. 26, unless aided by other words (b). **2953.**

Where general words apply to leaseholds.

In the case of a will made before the year 1838, when a testator uses general words equally applicable to freehold and leasehold property (such as "lands and tenements"), they are construed to apply to the freeholds only, if the testator had, at the date of his will, both freehold and leasehold property, unless a contrary intention appears; but if the testator had leasehold but no freehold property to satisfy them, they are held to apply to the leasehold (c). **2954.**

A general devise of the testator's lands now includes copyhold and leasehold, as well as freehold lands.

But by the stat. 1 Vict. c. 26, s. 26, "a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will." **2955.**

Mortgaged and trust estates pass

[In cases under the old law if] in a will there is a general devise in fee sufficiently comprehensive to pass

(a) *Mayor of Hamilton v. Hods-*  
*don*, 6 Moo. P. C. C. 76, 82.

(b) *Swift v. Srift*, 1 D. F. & J.  
 160.

(c) 6 Cruise T. 38, c. 10, § 90; 2  
 Rep. Leg. by White, 1489; 1 Jarm.  
 Wills, 2nd ed. 573, 579; *Hobson v.*  
*Blackburn*, 1 My. & K, 579.

the legal interest to the devisee, who is a person sui juris, and competent to convey, and the will does not charge the devised estate with debts, legacies, or annuities, or the charge may be referred to other property, in which the testator had the absolute beneficial interest, and there is not in the whole will any other object, purpose, or intention inconsistent with a devise of trust or mortgaged estates, then, although there is not in the will any declared intention of the testator to devise the trust or mortgaged estates, they will pass to the devisee, and in such a case the concurrence of the heir at law may be dispensed with. And the words "for the absolute use and benefit" of the devisee, will not prevent the devise from including the legal estate in property mortgaged to the testator (a). Also the legal estate in property of which the testator is mortgagee in fee will pass under a gift of "mortgages" or "securities for money" (b). And it has been held, that where a testator willed his wife "to receive moneys upon mortgage," these words passed the legal estate upon which the money was secured (c). **2956.**

Pr. III. T. 15,  
CH. 2, s. 2.

by the will  
of the mort-  
gagee or  
trustee,  
under the  
old law, in  
certain cases

[But in cases of death after the 31st of December, 1881, trust and mortgage estates, vested in a testator solely, will, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, like chattels real vesting in them or him, with

But not  
under the  
new law.

(a) Coote Mortg. 3rd ed. 549; Burton, § 611; 1 Jarm. Wills, 2nd ed. 591, 596; *Rackham v. Siddall*, 16 Sim. 297; *Doe d. Roylance v. Lightford*, 8 M. & W. 553; *Silvester v. Jarman*, 10 Price 78; *Hope v. Liddell*, 21 Beav. 183; *Re Finney's Estate*, 3 Gif. 465; *Re Field's Mortgage*, 9 Hare 414; *Lewis v. Mathews*, L. R. 2 Eq. 177; *In re Stevens' Will*, L. R. 6 Eq. 596; *Martin v. Laver-ton*, L. R. 9 Eq. 563; *In re Pack-*

*man and Moss*, L. R. 1 Ch. D. 214; *In re Brown and Sibly's Contract*, L. R. 3 Ch. D. 156; *In re Smith's Estate*, L. R. 4 Ch. D. 70; *In re Bellis's Trusts*, L. R. 5 Ch. D. 504.

(b) 1 Jarm. Wills, 2nd ed. 600; *In re King's Mortgage*, 5 De G. & S. 644; *Knight v. Robinson*, 2 K. & J. 503; *Rippen v. Priest*, 13 Scott 308.

(c) *Doe d. Guest v. Bennett*, 6 Exch. 892.

Pr. III. T. 15,  
CH. 2, s. 2.

all the powers, rights, equities, and obligations, as in the case of chattels real vesting in such representatives or representative who, for this purpose, must be regarded as the testator's heirs and assigns within the meaning of all trusts and powers (a).] **2957.**

Where lands  
in mortgage  
pass by the  
will of the  
mortgagor.

Lands which are in mortgage, and whereof the devisor has only the equity of redemption, will pass by the same words as lands not mortgaged; because a mortgage is only considered as a pledge for securing the repayment of a debt, and the lands remain in the mortgagor for every other purpose (b). **2958.**

Where a  
reversion  
passes.

Reversions in fee will pass under a general devise of "lands or hereditaments," or even under a devise of "lands not settled or disposed of" (c). **2959.**

Money  
devised or  
contracted  
to be laid out  
in the pur-  
chase of  
lands.

Money devised or contracted to be laid out in the purchase of lands passes by the words "lands, tenements, and hereditaments" (d). **2960.**

"My un-  
settled real  
estate."

The expression "my unsettled real estate" means, in common parlance, that part of my real estate which is not in settlement. But in its technical sense the word "estate" refers to the interest which the testator has in his hereditaments as well as to the hereditaments themselves; and hence in the legal sense the expression "my unsettled real estate" comprises such interest in hereditaments which have been put in settlement as is not tied up by the settlement, but is at the disposal of the testator, as well as hereditaments which have never been put in settlement (e). **2961.**

Lands "pur-  
chased."

Under a devise of lands "purchased," lands which have been taken in exchange will pass (f). **2962.**

(a) See supra, par. 997 a, and stat. 44 & 45 Vict. c. 41, s. 30, in Appendix.

(b) 6 Cruise T. 38, c. 10, § 128.

(c) 1 Jarm. Wills, 2nd ed. 558; 6 Cruise T. 38, c. 10, § 104.

(d) 6 Cruise T. 38, c. 10, § 55; 2 Spence's Eq. Jur. 264; 1 Jarm. Wills, 2nd ed. 494.

(e) *Incorporated Society v. Richards*, 1 D. & W. 258.

(f) *Doe d. Meyrick v. Meyrick*, 1 C. & M. 820.

The word "living" is ambiguous: it may mean either the advowson or the next presentation, according to the context (a). **2963.**

Pr. III.T.15,  
Ch. 2, s. 2.  
"Living."

Under a devise of a house "as now in the occupation of A.," without more words, it was held that the use of a pump in the yard of adjoining premises will not pass (b). **2964.**

"House, as  
now in the  
occupation  
of A."

### SECTION III.

#### *Of Devises of Copyholds.*

The old statutes of wills have no connection with copyholds. And though that part of the Statute of Frauds which relates to the signature of wills (c) mentions lands "devisable by any particular custom," still it does not include copyhold estates; so that by the old law copyholds were devisable by any instrument which was adequate to the testamentary disposition of personal estate (d). **2965.**

Pr. III.T.15,  
Ch. 2, s. 3.

Copyholds  
not within  
the old  
statutes of  
wills.

By the general custom of all manors every copyholder has a right to surrender his estate to the use of his will (e). But there are some customary estates in the north which were not devisable either directly or indirectly (f). **2966.**

By general  
custom they  
may be  
devised.

Formerly, copyholds could not be devised unless the testator had previously surrendered them to the use of his will, and they were considered to pass rather by that surrender than by the will itself. The will operated as a declaration of the uses of the surrender (g). A surrender to the use of a will could not be made before the

Surrender to  
the use of  
will.

(a) *Webb v. Byng*, 2 K. & J. 669.

(b) *Polden v. Bastard*, L. R. 1 Q. B. (Ex. Ch.) 156.

(c) Stat. 29 Car. 2, c. 3, s. 5.

(d) *Burton*, § 1287; 6 Cruise T. 38, c. 4, § 1; 1 Jarm. Wills, 2nd ed. 83.

(e) 6 Cruise T. 38, c. 4, § 2; 1

Cruise T. 10, c. 3, § 17.

(f) 1 Cruise T. 10, c. 3, § 17.

(g) *Burton*, § 1288; 6 Cruise T. 38, c. 4, § 1; 1 Jarm. Wills, 2nd ed. 45.

PT. III. T. 15,  
CH. 2, S. 3.

admittance of the devisor: for until then he had no estate or interest in the copyhold. Where a copyholder surrendered to the use of his will, the estate remained in him or his heirs until the admittance of the devisee, and did not vest in the lord during the copyholder's lifetime, nor in the devisee after the copyholder's decease until he was admitted. But if a devise were made to two persons and one of them was admitted according to the purport of the will, this enured to both (*a*). Where the legal estate in a copyhold was outstanding, the person entitled to the equitable interest might always devise it without a surrender: for otherwise it could not be disposed of by will; as a person who has not the legal estate in a copyhold could not make a surrender (*b*). And hence where a copyholder mortgaged his copyhold, and the mortgagee was admitted, the mortgagor, not having the legal estate of the copyhold in him, had no estate that he could surrender, and therefore might devise the copyhold premises without any surrender (*c*). But as the mortgagor had the legal estate till the mortgagee was admitted, so until that time the mortgagor could not devise the copyhold without a surrender to the use of his will (*d*). 2967.

Surrender  
to the use  
of a will  
rendered un-  
necessary.

By stat. 55 Geo. 3, c. 192, every disposition of copyhold tenements made by the last will of a person who should die after the 12th day of July, 1815, was to be as valid, though no surrender should have been made to the use of his will, as if such surrender had been made (*e*). This Act does not dispense with a particular mode of surrender required by the custom to give validity to a devise by a married woman (*f*). It is repealed by the stat. 1 Vict. c. 26, s. 2, but the necessity

(*a*) 6 Cruise T. 38, c. 4, § 3, 4, 5,  
11; 1 Jarm. Wills, 2nd ed. 45.

(*b*) 6 Cruise T. 38, c. 4, § 21.

(*c*) 6 Cruise T. 38, c. 4, § 25.

(*d*) 6 Cruise T. 38, c. 4, § 8; 1  
Jarm. Wills, 2nd ed. 45.

(*e*) Burton, § 1288.

(*f*) 1 Jarm. Wills, 2nd ed. 46.

of a surrender is dispensed with by the enabling clause of the latter Act (a). **2968.**

Pt. III.T.16,  
CH. 2, s. 3.

By s. 4 of the same Act, however, it is provided, "that where any real estate of the nature of customary freehold or tenant right, or customary or copyhold, might, by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will shall be entitled to be admitted, except upon payment of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering, or enrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator: Provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine, and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering, or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine, or sums of money due as aforesaid

As to the fees and fines payable by devisees of customary and copyhold estates.

(a) See *supra*, par. 2790.

Pr. III.T.15,  
Ch. 2, s. 3.

shall be paid in addition to the stamp duties, fees, fine, or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid." 2969.

Devise by a  
tenant in  
tail.

Where a person having an estate tail in a copyhold surrenders it to the use of his will, if entails by the custom of the manor are not barrable by recovery or fine, but by surrender, in such case the surrender to the use of his will not only effectuates the will, but operates as a bar to the entail (a). 2970.

Where  
copyholds  
pass under  
general  
words.

By the old law, before the stat. 55 Geo. 3, c. 192 (b), legal copyholds not surrendered to the use of a will, though in some cases they would pass in equity, did not pass at law, by a specific description, much less by general words. And without some indication of intention beyond mere general words of devise, an equitable interest in copyholds would not pass. But, as we have already seen, by the stat. 1 Vict. c. 26, a general devise will now include unsurrendered copyholds, unless a contrary intention appears by the will. And so it would, as the law stood after the stat. 55 Geo. 3, c. 192, and before the stat. 1 Vict. c. 26 (c). And even by the old law, where copyhold lands were surrendered to the use of a will, they passed by a general devise of all the testator's lands and tenements, notwithstanding there were freeholds to answer such devise (d). 2971.

Even by the old law, if a man made a disposition by will of all his copyhold estates generally, and afterwards purchased other copyhold estates, and surrendered them to the uses declared by his will, or even to the uses declared by his will of and concerning the same, the after-purchased estates would pass under the general

(a) 6 Cruise T. 38, c. 4, § 19.

*Torre v. Browne*, 5 H. L. Cas. 555.

(b) See *supra*, par. 2968.

See *supra*, par. 2955.

(c) 6 Cruise T. 38, c. 10, § 129;

(d) 6 Cruise T. 38, c. 10, § 129.

1 Jarm. Wills, 2nd ed. 569—571;



devise, although the will was not republished (a). By the new law, such after-purchased estates would pass without any surrender (b). **2972.**

Pr. III.T.15,  
Ch. 2, s. 3.

Even under the law prior to the stat. 1 Vict. c. 26, and subsequent to the stat. 55 Geo. 3, c. 192, a purchaser, before admittance, has an equitable and devisable interest, and the devise is not revoked by his subsequent admittance, and is good without any surrender to the uses of the will, and though the words be mere general words, such as "real estate" (c). **2973.**

Devise by a  
purchaser  
before  
admittance.

Even under the old law, where a person devised his manor, and, subsequent to the execution of his will, but before his decease, a copyhold escheated, it passed to the devisee (d). **2974.**

Escheated  
copyholds  
pass with  
the manor.

A surrender of copyholds made after the will and amounting to a partial alienation of the estate, does not operate as a complete revocation of the will, which may still have its effect upon the reversion or other continuing interest of the testator (e). **2975.**

Revocation  
by surren-  
der of copy-  
holds.

By s. 5 of the stat. 1 Vict. c. 26, "when any real estate of the nature of customary freehold or tenant right or customary or copyhold shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor; and when any trusts are declared by the will of such real estate, it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the

Wills or  
extracts of  
wills of  
customary  
freeholds  
and copy-  
holds to be  
entered on  
the court  
rolls;

(a) Sugd. Concise View, 128; 1 Jarm. Wills, 2nd ed. 46.

(b) See *supra*, par. 2790.

(c) *Seaman v. Woods*, 24 Beav. 372.

(d) 6 Cruise T. 38, c. 3, § 40.

(e) Burton, § 1292.

Pr. III. T. 15,  
Ch. 2, s. 3.

and the lord  
to be en-  
titled to the  
same fine,  
etc., when  
such estates  
are not now  
devisable as  
he would  
have been  
from the  
heir in case  
of descent.

trusts declared by such will; and when any such real estate could not have been disposed of by will if this Act had not been made, the same fine, heriot, dues, duties, and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall, as against the devisee of such estate, have the same remedy for recovering and enforcing such fine, heriot, dues, duties, and services as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent." 2976.

## CHAPTER III.

## OF BEQUESTS SEPARATELY CONSIDERED.

## SECTION I.

*Of General, Specific, and Demonstrative Legacies.*

BEQUESTS or legacies may be classed under three heads—  
General, Specific, and Demonstrative (a). **2977.**

PT. III.T.15,  
CH. 3, s. 1.

A general bequest is a legacy of personal estate by a  
general denomination which does not necessarily designate  
any particular thing forming part of the testator's estate  
either at the date of the will or at the death of the  
testator, any more than something of the same kind not  
forming part of his estate: as where a bequest is made  
of goods and chattels, or of money or stock generally (b).  
**2978.**

Division of  
legacies.  
Definition of  
a general  
legacy.

A specific bequest is a legacy of a certain thing or of  
certain things forming part of the testator's estate either  
at the date of his will or at the time of his decease, and  
distinguished by him from all other things of the same  
kind: as in the case of a bequest of stock, by a particular  
description, which a testator has at the date of his will  
or may have at the time of his decease, or of money in a  
bag, or of a certain piece of plate, or of a term of years (c).  
**2979.**

Definition  
of a specific  
legacy.

(a) See 1 Rop. Leg. by White, 1,  
191—2, 198.

(b) See 1 Rop. Leg. by White, 1,  
191, 203; *Fielding v. Preston*, 1 D.  
& J. 438.

(c) See 1 Rop. Leg. by White, 1,

191, 203; *Stephenson v. Dowson*, 3  
Beav. 342; *Mills v. Brown*, 21 Beav.  
1; *Chester v. Urwick*, 23 Beav. 402;  
*Fielding v. Preston*, 1 D. & J. 438;  
*Moore v. Moore*, 29 Beav. 496; *Mea-  
sure v. Carleton*, 30 Beav. 538;

Pr. III.T.15,  
Ch. 3, s. 1.

Definition  
of a demon-  
strative  
legacy.

"Pecuniary  
legacies."

Certain  
cases of  
general and  
specific  
legacies  
distin-  
guished.

A demonstrative bequest is a legacy of a sum of money, with reference to a particular fund for its payment (a).

**2980.**

The terms "pecuniary legacies" and "general legacies" are sometimes used as synonymous; but every general legacy is not pecuniary, i.e., relating to money; and one species of specific legacy is of a pecuniary nature: so that, in fact, there may be either a general pecuniary legacy or a specific pecuniary legacy (b). **2981.**

The fact of a testator giving an amount of property of a particular kind, and of his having at the date of the will some property of that kind of the same amount, is not a ground upon which the Court can conclude that the legacies are specific, where such property can be bought, and where he has not in any way designated the property bequeathed as the identical property he had at the date of his will or should have at the time of his death. So that where he has a certain number of canal shares at the date of his will, which by Act of Parliament were to be deemed personalty, and he bequeaths that precise number of canal shares generally, this legacy is general, and amounts in effect to a gift of such an indefinite sum of money as will suffice to purchase so many shares as he has given: and hence if at the testator's decease he has no shares, the legatee will be entitled to the value of them out of the general personal estate. But the word "my" preceding the words "stock," "annuities," or "shares," renders a legacy of stock, annuities, or shares specific (c). And

*Jones v. Southall* (No. 2), 32 Beav. 31; *Paget v. Huish*, 1 Hem. & M. 663; *In re Jeffery's Trusts*, L. R. 2 Eq. 68; *Oliver v. Oliver*, L. R. 11 Eq. 506; *Davies v. Fowler*, L. R. 16 Eq. 308; *Page v. Young*, L. R. 19 Eq. 501; *Bothamley v. Sherson*, L. R. 20 Eq. 344.

(a) 1 Rep. Leg. by White, 192, 198, 199; *Robinson v. Geldard*, 3 Mac. & G. 735; *Hodges v. Grant*, L. R. 4 Eq. 140.

(b) 1 Rep. Leg. by White, 191, n.

(c) See 1 Rep. Leg. by White, 204, 205, 216; *Robinson v. Addison*, 2 Beav. 515; *Miller v. Little*, 2

where a certain amount of stock is bequeathed, with a direction, that, if the testator should not have sufficient stock to answer the legacy, his executors should, out of his residuary estate, purchase enough to make up the deficiency, such a bequest creates a specific legacy (a). 2982.

Pr. III.T.15,  
CH. 3, s. 1.

There is often great uncertainty whether a legacy is specific or demonstrative (b). Thus, where a testator made a bequest in these terms: "I give to M. D. the sum of £100, which said sum is owing to me by bond from E. D." it was held to be a specific and not a demonstrative legacy (c). But where a testator made the following bequest: "I give to my son £10,000 sterling, being my share of the capital now engaged in the banking business of," etc., it was held to be a demonstrative and not a specific legacy (d). 2983.

Uncertainty  
whether  
legacy is  
specific or  
demonstra-  
tive.

The practical distinctions between these different kinds of legacies are these: 1. If, after payment of debts, there is a deficiency of assets for payment of all the legacies, a general legacy will be liable to abate; but a specific legacy will not, without express words; because the entire specific thing is given to the specific legatee. 2. On the other hand, if a specific bequest is made of a fund, and it fails, the legatee will not be entitled to any compensation out of the general personal estate of the testator; because nothing but the specific thing is given to the legatee (e). 3. A demonstrative

Practical  
distinctions  
between  
general,  
specific, and  
demonstra-  
tive  
legacies.

Beav. 259; *Mytton v. Mytton*, L. R. 19 Eq. 30; *Bothamley v. Sherson*, L. R. 20 Eq. 304; *Macdonald v. Irrine*, L. R. 8 Ch. D. (Ap.) 101; *Shepherd v. Bretham*, L. R. 6 Ch. D. 597.

405. See also *Duncan v. Duncan*, 27 Beav. 386.

(d) *Sparrow v. Josselyn*, 16 Beav. 135.

(e) 1 Rop. Leg. by White, 191—2; *Duncan v. Duncan*, 27 Beav. 386; V.-C. Kindersley in *Mullins v. Smith*, 1 Drew. & Sm. 210; *Gordon v. Duff*, 28 Beav. 519; *Davies v. Fowler*, L. R. 16 Eq. 308; *Macdonald v. Irrine*, L. R. 8 Ch. D. (Ap.) 101.

(a) *Townsend v. Martin*, 7 Hare 471.

(b) See *Williams v. Hughes*, 24 Beav. 474; *Gordon v. Duff*, 28 Beav. 519; *Beran v. Attorney-General*, 4 Gif. 361.

(c) *Davies v. Morgan*, 1 Beav.

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CH. 3, S. 1.

legacy will not be liable to abate with general legacies upon a deficiency of assets. And if the fund pointed out for its payment fails, the legatee is entitled to payment out of the general assets (*a*). Thus, legacies directed to be paid or bequeathed out of a debt or security, are to be paid out of the debt or security in preference to general legacies; and if the debt is not in existence at the testator's death, or if it is insufficient to pay the legacies, the legatees will be entitled to payment out of the general assets (*b*). But when stock is specifically bequeathed, and it does not wholly or does only in part exist at the testator's death, the legacy will either be wholly or partially adeemed, as the case may be (*c*). And if a debt specifically given is received by the testator, the bequest of it will be adeemed, since the subject of the bequest no longer exists; for the debt is discharged, and the proceeds do not fall within the description of the bequest (*d*). 4. A specific legacy, if of stock, carries with it the dividends which accrue from the death of the testator; but a demonstrative legacy does not carry interest from the testator's death (*e*). 5. A specific legatee is entitled to have his legacy redeemed from charges created by the testator (as distinguished from charges incidental to the property) at the expense of the testator's general personal estate, or to have compensation out of it (*f*). **2984.**

(*a*) 1 Rop. Leg. by White, 192, 198—9; V.-C. *Kindersley* in *Mullins v. Smith*, 1 Dr. & Sm. 210. For an instance of a legacy which did not fall within any of these classes, see *Coard v. Holderness*, 22 Beav. 391.

(*b*) 1 Rop. Leg. by White, 237.

(*c*) 1 Rop. Leg. by White, 3; *Harrison v. Jackson*, L. R. 7 Ch. D. 339.

(*d*) 1 Rop. Leg. by White, 334; *Sidebotham v. Watson*, 11 Hare

170; *In re Bridle*, L. R. 4 C. P. D. 336. In this case the author conceives that an exception should have been made; and that reason and justice were unnecessarily sacrificed to a general rule which did not properly apply to such a state of facts.

(*e*) V.-C. *Kindersley* in *Mullins v. Smith*, 1 Dr. & Sm. 210; *Davies v. Fowler*, L. R. 16 Eq. 308.

(*f*) *Bothamley v. Sherson*, L. R. 20 Eq. 304.

## SECTION II.

*Of the Description of the Things Bequeathed.*

However general the words of bequest of a term may be, if they are satisfied by the interest which the testator had at the date of his will, the bequest will not pass a new estate acquired by the testator after the devise by renewal or otherwise; at least where the legal estate in the term was vested in the testator himself, and not in some other person in trust for him (a). **2985.**

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Ch. 3, s. 2.

"Term."

The word "money" will include notes payable to bearer, exchequer bills, and bills of exchange indorsed in blank; because they are not to be considered as choses in action (b). Generally, choses in action, such as Government securities and promissory notes not payable to bearer, do not pass under the name of money or cash (c). The word "money" will not pass shares or stock in the funds, unless its meaning is enlarged by the context; or unless the testator at the date of his will and his death had no other property on which the bequest could operate (d). And the circumstance, that the amount of cash which the testator had at the time of his death was very small, and yet the money was given to one for life with a limitation over, is not of itself sufficient to extend the signification of the word money; at least, if there are other parts of the personal estate which neither that expression nor any others used by the testator would pass; so that there is nothing on the face of the will to show that he intended to make a disposition of the whole personal estate (e). But in the absence of any

"Money."

(a) 1 Rep. Leg. by White, 350, 352; 1 Jarm. Wills, 2nd ed. 263.

(b) 1 Rep. Leg. by White, 282; 1 Jarm. Wills, 2nd ed. 657, n. (f).

(c) *Marquis of Hertford v. Lord Lowther*, 7 Beav. 1; 1 Rep. Leg.

by White, 282.

(d) *Chapman v. Reynolds*, 28 Beav. 221; *Collins v. Collins*, L. R. 12 Eq. 455.

(e) *Lowe v. Thomas*, 1 Kay 396; 5 D. M. & G. 315; *Gosden v. Dot-*

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CH. 3, s. 2.

other bequest of the residue, or other indication to the contrary, a bequest of any money which may remain after payment of debts, includes the general residue not specifically bequeathed, and which by law is liable to the payment of the testator's debts (*a*). And so a bequest of any money which may remain after payment of legacies, may include the general residue, if the testator has manifested an intention of disposing of everything, which would otherwise be frustrated (*b*). And a bequest of "the income arising from his principal money" for the testator's wife and children, will include even leaseholds (but not real estate), where he leaves little money and yet a large personalty, and it was apparently his intention to dispose of his whole personal estate by that description (*c*). **2986.**

"Money of which I may die possessed" will not include an apportioned part of an annuity or of interest from the last stated days of payment to the testator's death; nor a legacy due which had not been acknowledged by the executors to be at the testator's disposal (*d*). **2987.**

"Pecuniary legacies."

And as stock in the funds is not money, so legacies of stock are not properly "pecuniary legacies" (*e*). **2988.**

"Money due."

Freight, under a charterparty, executed after the date of a will, and in respect of a voyage not completed till after the testator's death, will not pass as "money which at the time of his decease should be due to him" (*f*). **2989.**

But money receivable by executors under a policy of

*terill*, 1 My. & K. 56; *Larner v. Larner*, 3 Drew. 704; *Newman v. Newman*, 26 Beav. 218; *Cowling v. Cowling*, 26 Beav. 449.

(*a*) *Stocks v. Barre*, 1 Johns. 54; *Nevinson v. Lady Lennard*, 34 Beav. 487.

(*b*) *Montague v. Earlof Sandwich*,

33 Beav. 324.

(*c*) *Prichard v. Prichard*, L. R. 11 Eq. 232.

(*d*) *Byrom v. Brandreth*, L. R. 16 Eq. 475.

(*e*) 11 Jarm. & Byth. by Sweet, 457.

(*f*) *Stephenson v. Dowson*, 3 Beav. 342.



assurance on the testator's life, or damages recovered in an action by executors for a breach of contract committed in his lifetime, will pass under a bequest of "any money he may die possessed of, or which may be due and owing to him at the time of his decease" (a). **2990.**

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CH. 3, s. 2.

A bequest of the testator's "ready money" comprehends money of the testator in the hands of his banker, or in a savings bank where he had given notice for payment, but not promissory notes or notes of hand, or debts due to him, however safe, or with whatsoever facility obtainable (b). And it was held, that money of a testator which at the time of his death was in the hands of a salemaster in Smithfield was not ready money within the meaning of a clause directing the payment of debts, by the application in the first instance, of all his ready money and securities for money (c). **2991.**

"Ready money."

While the stat. 3 & 4 Will. 4, c. 85, for the regulation of the East India Company's Charter, was in force, the capital stock of the Company was not "a Government or Parliamentary stock or fund"; nor was it a foreign stock or fund (d). **2992.**

Government or parliamentary stock or funds.

Foreign stock or fund.

Railway preference and other stock will pass under the term "railway shares," where the testator never had any shares, but had railway stock at the date of the will (e). And unless there are indications to the contrary, railway shares will pass railway stock, even where the testator has both railway stock consisting of shares paid up and consolidated into stock, and also railway shares partly paid up (f). **2993.**

Railway stock or shares.

(a) *Petty v. Willson*, L. R. 4 Ch. Ap. 574; *Bide v. Harrison*, L. R. 17 Eq. 76.

(b) *Parker v. Marchant*, 1 Y. & C. C. C. 290; 1 Phil. 356; *In re Powell's Trust*, 1 Johns. 49.

(c) *Smith v. Butler*, 1 J. & L. 692.

(d) *Brown v. Brown*, 4 K. & J. 704.

(e) *Trinder v. Trinder*, L. R. 1 Eq. 695.

(f) *Morrice v. Alymer*, L. R. 10 Ch. Ap. 148; 7 H. L. 717, overruling *Oakes v. Oakes*, 9 Hare 666.

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CH. 3, s. 2.

Fortune or  
money in  
the funds.

Bank stock will not pass under the description of fortune or money "in the funds," without aid from the context. Money in the funds is a portion of the sums lent on the security of the public funds granted by Parliament. Bank stock is nothing more than a proportional share of the profits of the corporation of the Bank of England belonging to an individual. The dividends on the public funds are paid by the Bank as agents of the Government. The dividends on bank stock are paid by the Bank as a share of their own profits (a). **2994.**

When  
interest  
passes as  
well as the  
principal.

The bequest of a certain specified sum due upon a particular security will not pass any part of the interest which may be owing at the testator's death or at the period when the will was made (b). But a gift of a bond or of the money (generally) owing on a bond, will, unless restrained by the context, carry arrears of interest due at the testator's death. And a bequest of a mortgage seems to admit of the same construction (c). **2995.**

Where a  
bequest of  
interest  
passes the  
principal.

A bequest of the interest of a sum of money passes the principal, although expressed to be for the sole use and benefit of a woman, free, etc., and her receipt alone to be a sufficient discharge, and although the word "absolutely" be used in a bequest of specific articles to the same person (d). **2996.**

Where  
dividends  
for a certain  
period pass  
as if given  
as a gift of  
a principal  
sum equivalent to those  
dividends.

Where a testator directed the income of his residuary estate to be paid to his three children in certain proportions; and that, after the decease of any one or two of them, until the decease of the survivor, the shares of the deceased should go to their children; and that, after the decease of the surviving child, the capital of the residue

(a) *Slingsby v. Grainger*, 8 D. M. & G. 385; 7 H. L. Cas. 273, 285, 288.

(b) 1 Rep. Leg. by White, 288; 2 Id. 1484; 11 Jarm. & Byth. by

Sweet, 461.

(c) 11 Jarm. & Byth. by Sweet, 461.

(d) *Humphrey v. Humphrey*, 1 Sim. (N. S.) 536.

should be divided amongst the children of his said children per capita; and one of the children had children, but they all died in her lifetime, and she herself died before one of the other children; it was held that the children of the child so dying took vested transmissible interests in the income which accrued between the death of their mother and the death of the survivor of the testator's children, on the ground that the grandchildren were to take, not by way of substitution only in case they survived their parent, but that they took the gift of the dividends from the death of their parent, for the life of the survivor, as if it had been a simple gift of a principal sum equivalent to those dividends (a). **2997.**

PT. III.T.15,  
CH. 3, s. 2.

Under a bequest of a certain specified sum secured upon a policy of insurance, bonuses will pass, unless a contrary intention appears (b). But a bonus on shares declared in the lifetime of the testator, though not payable till after his death, will not pass under a bequest of the income or proceeds of the shares (c). **2998.**

Bonuses  
pass under a  
bequest of  
the sum  
secured.

The word "debentures," occurring in a bequest of the general mass of the testator's personal property, was held by Sir E. Sugden, when Lord Chancellor of Ireland, to be sufficient to pass policies of life insurance, even though the testator had some debentures specifically so called (d). **2999.**

"Debentures."

Bills of exchange or promissory notes, bonds, and mortgage debts, will pass by the words "securities for money" (e). **3000.**

"Securities  
for money."

It has been held that bank stock, and canal and railway shares will not pass under a bequest of property

"Vested in  
securities."

(a) *Homer v. Gould*, 1 Sim.(N.S.) 541.

Gould, temp. Sugden, 270; in *Re Lane, Luard v. Lane*, L.R.14 Ch.D.

(b) 1 Rep. Leg. by White, 296; *Roberts v. Edwards*, 33 Beav. 259.

856, it was held that "debentures" did not pass "debenture stock" into which they had been converted.

(c) *Lock v. Venables*, 27 Beav. 568.

(e) 1 Rep. Leg. by White, 284.

(d) *Philips v. Eastwood*, Lloyd &

PT. III. T. 15,  
CH. 3, s. 2. "vested in securities" or "money or securities for money" (a). And it has also been held that a banker's deposit notes, being receipts for money, to account for on demand, will not pass as "securities for money" (b).  
**3001.**

"Foreign bonds."

It has been held, where the testator had foreign bonds, that colonial bonds did not pass under the description of "foreign bonds," even though it was necessary to include them in order to make up the amount specified (c).  
**3002.**

"Goods, chattels, property, effects, personal estate, things."

The word "goods," or "chattels," or "effects," standing alone, will embrace all the personal estate of a testator: as bonds, notes, money, plate, furniture, etc. (d). But when a testator only bequeaths goods and chattels or effects in a particular situation, as "all his goods in his house at A.," those alone pass which may be regarded as then connected with that locality, rather than as independent of locality; so that furniture not attached to the freehold, linen, plate, money, and bank notes, will pass; but not things in action, as bonds, mortgages, receipts, etc. (e). So, a specific legacy of all a testator's "property," "personal estate," or "things," in a particular place, will not pass choses in action there (f). And when the word "goods," or "chattels," or "effects," or "personalty," is preceded and connected with a number of substantives of narrower import, it will be confined to property ejusdem generis with those previously described by those words; unless something is excepted out of the things enumerated,

(a) 11 Jarm. & Byth. by Sweet, 452; *Huddleston v. Gouldsbury*, 10 Beav. 547; *Ogle v. Knipe*, L. R. 8 Eq. 434.

(b) *Hopkins v. Abbott*, L. R. 19 Eq. 222.

(c) *Hull v. Hill*, L. R. 4 Ch. D. 97.

(d) 1 Rep. Leg. by White, 250. 280; 1 Jarm. Wills, 2nd ed. 644;

*Kendall v. Kendall*, 4 Russ. 360.

(e) 1 Rep. Leg. by White, 250; 11 Jarm. & Byth. by Sweet, 442; *Marquis of Hertford v. Lord Lonthor*, 7 Beav. 1; *Swinfen v. Swinfen* (No. 4), 29 Beav. 207.

(f) 1 Rep. Leg. by White, 259, 260; 11 Jarm. & Byth. by Sweet, 442.

by words of narrower import, which is not ejusdem generis with those things; or unless the bequest is expressly or apparently residuary (a). But where a testator disposes of all the residue of his estate and effects, or disposes of his "personal estate," adding, without any intervening words, an enumeration of certain specific articles, the general words are not limited to things ejusdem generis with the specific articles, but the words enumerating the specific articles are regarded as a defective enumeration (b). If a bequest is made "of all the testator's goods, etc., in a particular house or place," without any words indicating that he refers to such only as are there at a particular time (as at the date of his will), whatever personal chattels are found there at his death will be the property of the legatee (c). And none but those which are in that place at the death of the testator will pass, except where the locality of them was referred to merely for the purpose of describing the articles (d). [After a devise of all the real estate to one person, a bequest to another person of "all the farming stock, goods, chattels, and effects in and about" a farm, gives to the legatee the crops growing on the farm at the testator's death (e).]

**3003.**

A bequest of "household furniture, plate, house linen, and all other chattel property," does not include the general personal estate; for the words "all other chattel property" must be construed by the other words with which they are associated, and mean all other chattel pro-

"All other  
chattel  
property."

(a) 1 *Rop. Leg. by White*, 261, 267, 280; 1 *Jarm. Wills*, 2nd ed. 644, 648, 653; *Re Wright's Trusts*, 15 *Beav.* 367; *Arison v. Simpson*, 1 *Johns.* 43; *Borton v. Dunbar*, 2 *Gif.* 221; *Swinfen v. Swinfen* (No. 4), 29 *Beav.* 207; *Nugee v. Chapman*, 27 *Beav.* 290; *Hodgson v. Jer.*, L. R. 2 Ch. D. 122.

(b) *Fisher v. Hepburn*, 14 *Beav.* 626; *Dean v. Gibson*, L. R. 3 *Eq.* 713; *King v. George*, L. R. 4 Ch. D. 435; affirmed, 5 Ch. D. (Ap.) 627.

(c) 1 *Rop. Leg. by White*, 248.

(d) 1 *Rop. Leg. by White*, 343—4.

(e) *In re Roose, Evans v. Williamson*, L. R. 17 Ch. D. 696.

Pr. III.T.15,  
Ch. 3, s. 2. perty ejusdem generis, at least where there is a distinct residuary clause (a). 3004.

"Et cetera." In like manner the words "et cetera," following specific articles, refer to things ejusdem generis, and do not include the general residue, unless, on the whole, a contrary intention appears (b). 3005.

"Furniture." Pictures placed as ornamental furniture of a house, and plate and linen, pass under the description of "all furniture belonging to a house." But, in general, books will not pass under that description (c). 3006.

"Fixed furniture." Where "fixtures and fixed furniture" are bequeathed to a person for life, and the household goods, furniture, and other property "not comprehended under the term fixtures and fixed furniture" are bequeathed to him absolutely, the term "fixed furniture" includes looking-glasses standing on chimney-pieces and nailed to the wall, and bookcases standing on, but not fastened to, brackets, and screwed to the wall (d). 3007.

"Household furniture." Under special circumstances [but not as a general rule] a bequest of household furniture will pass fixtures belonging to the testator in a leasehold house occupied by him (e). But books do not pass under the words "household furniture" (f). Nor do goods in a house of business which belong merely to the business (g). 3008.

"Household goods." The term "household goods" includes all articles of household which are neither fixtures nor things of such a nature that they are consumed in being enjoyed (h),

(a) *Lampier v. Despard*, 2 D. & W. 59.

(b) *Newman v. Newman*, 26 Beav. 220; *Barnaby v. Tassell*, L. R. 11 Eq. 363; *Chapman v. Chapman*, L. R. 4 Ch. D. 800.

(c) *Cremorne v. Antrobus*, 5 Russ. 312.

(d) *Birch v. Dawson*, 2 Ad. & E. 37; 6 C. & P. 658; 4 N. & M. 22.

(e) *Paton v. Shepherd*, 10 Sim. 186; *Finney v. Grice*, L. R. 10 Ch. D. 13. As to the words "household furniture, goods or effects," see 1 Jarm. Wills, 2nd ed. 650, n. (b).

(f) 1 Rep. Leg. by White, 269.

(g) *Manning v. Purcell*, 7 D. M. & G. 55, 64, 68.

(h) See 1 Rep. Leg. by White, 253, 256.

but not articles used in the testator's trade, though contained in his house (a). **3009.**

Pr. III. T. 15,  
Ch. 3, s. 2.

The term "household effects" is more extensive than household goods or furniture (b). Occurring after "household furniture," it comprises such things as wines (c). **3010.**

"Household effects."

The term "plant" includes all the things which form part of the permanent establishment used in the purposes of a trade, but not the fluctuating stock in trade, or the household furniture. A gift of the plant and goodwill together may pass the leasehold interest in the house, where that would be valueless without the goodwill (d). **3011.**

"Plant and goodwill."

The term "linen," without qualification, will comprise body linen, table and bed linen, and every article to which that general word can be applied (e). **3012.**

"Linen."

"Plate," of itself, will not include plated articles (f). **3013.**

"Plate."

### SECTION III.

#### *Of the Shares or Proportions in which two or more Legatees take.*

Under a bequest to the persons who would have been entitled under the Statute of Distributions, it should be expressed whether they are to take in equal shares, or in the proportions fixed by the statute (g). **3014.**

Pr. III. T. 15,  
Ch. 3, s. 3.

Where a testator bequeaths personal estate to several persons, as tenants in common, with a declaration, that, upon all or any of their deaths before a particular time, their respective shares shall be equally divided among

(a) 1 Rep. Leg. by White, 253.

(e) 1 Rep. Leg. by White, 289.

(b) 11 Jarm. & Byth. by Sweet, 441.

(f) *Holden v. Ramsbottom*, 4 Gif. 205.

(c) *Cole v. Fitzgerald*, 1 S. & S. 189; 3 Russ. 301.

(g) See *Martin v. Glover*, 1 Coll. 269; *Richardson v. Richardson*, 14 Sim. 526.

(d) *Blake v. Shaw*, 1 Johns. 732.

PT. III. T. 15,  
CH. 3, s. 3.

their respective issue or descendants, and they die before the arrival of the period, some leaving children, and others more remote descendants, the issue of such deceased persons will take their shares, per stirpes, and the issue of any one of them so dying, whether they be his children or more remote issue, will divide his share among themselves equally per capita (*a*). **3015.**

Under a bequest to a husband and wife and another person, or other persons though in equal shares, the husband and wife will generally take only one share between them, as being but one person in law (*b*). **3016.**

Under a bequest to be equally divided amongst the testator's next of kin, both paternal and maternal, the fund is divisible between the two classes per capita, and not per stirpes (*c*). And under a bequest to A. and B. and their several children, to be divided between them in equal shares and proportions, the parents and their children (such children being in esse at the date of the will) take per capita and not per stirpes (*d*). **3017.**

Gift to  
children  
equally, with  
hotchpot  
clause.

[In the case of a residuary gift to a widow for life with remainder to children equally, and an ordinary proviso for bringing into hotchpot all sums advanced to any of them by the testator in his lifetime, what is meant is, that none of the children who have not been advanced, or who have received less than others, shall suffer: that is to say, that all the children shall, at the widow's death, take the same shares as they would have taken if no advances at all had been made. The estate must be considered as ascertained at the death of the

(*a*) 1 Rep. Leg. by White, 163. See *Timins v. Stackhouse*, 27 Beav. 434.

(*b*) *In re Wylde*, 2 De G. M. & G. 724; *Gordon v. Whieldon*, 11 Beav. 170. But see *Paine v. Wagner*, 12 Sim. 184; *Warrington v. War-*

*rington*, 2 Hare 54; *Marchant v. Cragg*, 31 Beav. 398.

(*c*) *Dugdale v. Dugdale*, 11 Beav. 402.

(*d*) *Cunningham v. Murray*, 1 De G. & S. 366.



widow, and if the estate is not then immediately divided, interest at 4 per cent. must be calculated from the widow's death as if no advances had been made; but the children can only receive interest on the property to be divided, from the time fixed for division, and not on advances during the testator's lifetime, either from the date of his death or from the date of the respective advances (a).] **3017a.**

PT. III. T. 15,  
CH. 3, s. 3.

#### SECTION IV.

##### *Of the Priority and Abatement of Legacies.*

If the assets, after payment of debts, are insufficient for the payment of all the legacies and annuities, all the general voluntary legacies and annuities abate rateably: for, since they cannot all be paid in full, they shall all abate rateably, on the principle of the maxim "equality is equity," "equity delighteth in equality." This rule is indeed subject to exceptions; for there are cases in which some annuities or legacies are to be paid in priority to others. But the onus lies on the party seeking priority, to make out that such priority was intended by the testator; and the proof of this must be clear and conclusive. The reason is, that a testator, in the absence of clear and conclusive proof to the contrary, must be deemed to have considered that his estate would be sufficient; and consequently not to have thought it necessary to provide against a deficiency, by giving a priority in case of a deficiency to some of the objects of his bounty (b). **3018.**

PT. III. T. 15,  
CH. 3, s. 4.

General rule  
that all the  
general  
voluntary  
legacies and  
annuities  
abate.

Onus  
probandi on  
party seek-  
ing priority.

Hence, a difference in time of payment will not impart to any of the legatees such a preference as to exempt

No priority  
from diffe-  
rence in  
times of

(a) *In re Rees*, *Rees v. George*,  
L. R. 17 Ch. D. 701.

(b) 1 *Rop. Leg.* by White, 421,  
245; *Story's Eq. Jur.* § 544—7; 2

*Spence's Eq. Jur.* 314; *Miller v. Huddleston*, 3 *Mac. & G.* 523;  
*Thwaites v. Foreman*, 1 *Coll.* 409.

Pr. III.T.15,  
Ch. 3, s. 4.

payment;  
nor from  
words  
merely  
pointing out  
order of  
payment;

them from abating upon a deficiency of assets. Nor will abatement be prevented by words which may be merely expressive of the order in which the bequests are made in succession (a). Thus, the words "after payment" may merely refer to the order of payment to be made, on the supposition that there was a sufficiency of assets to pay all the legacies, and do not necessarily or clearly import a preference in the event of a deficiency of assets. They are merely introductory to what follows; importing no more than would have been implied without them (b). And so where a testator, with reference to the different payments to be made by his executors, uses the words "in the first place," "and then," and "in the next place," these words, unsupported by others, will be construed to be mere introductory words of enumeration, and not words denoting priority of payment (c). **3019.**

nor from the  
character of  
the legatee,  
or the  
purposes of  
the legacy.

And when there are no expressions manifesting an intent to give a priority to a general voluntary legacy, the character of the legatee or the purposes to which the legacy is to be applied will not exempt it from abatement (d). Hence legacies to the children of the testator will be subject to abatement as well as legacies to strangers. If the testator has thought fit to provide for other persons besides his children and his wife, so that he has not made them the exclusive objects of his bounty in the case of the property being sufficient, he might never have intended them to be the exclusive objects of his bounty even in the event of a deficiency. He may have intended that the others should share with them in the latter case as well as in the former, and in the same proportion (e). **3020.**

(a) 1 Rep. Leg. by White, 426, 427.

(b) *Miller v. Huddleston*, 3 Mac. & G. 525; *Haslewood v. Green*, 28 Beav. 1.

(c) *Thwaites v. Freeman*, 1 Coll. 409.

(d) 1 Rep. Leg. by White, 418.

(e) *Miller v. Huddleston*, 3 Mac. & G. 529.

Upon the same principle, bequests to charities are not privileged from abatement. Nor are legacies to executors for their trouble (a). Nor are legacies bequeathed to creditors whose debts had been previously compounded (b). **3021.**

PT. III. T. 15,  
CH. 3, s. 4.

When a general legacy is given for a valuable consideration, as in consideration of a debt owing to the legatee, or of his relinquishing any right or interest, it will have priority over merely voluntary legacies. Hence legacies in lieu of dower out of an estate which is subject to dower, do not abate with other legacies, but have priority over them (c). **3022.**

Legacies for a valuable consideration have priority.

As between specific legatees and general legatees, in case of a deficiency of assets, the loss falls entirely on the latter; so that the specific legacies are paid in preference to the general legacies (d). If a fund is not sufficient for both pecuniary and residuary legatees, and it was not of an ascertained amount or expressly assumed by the testator to be of a certain amount, but the amount of it was unknown to him, the loss will fall wholly on the residuary legatees (e). **3023.**

Abatement as between general and specific legatees; and as between pecuniary and residuary legatees.

## SECTION V.

### *Of Double Legacies and Residuary Legacies.*

Where, in form, two legacies are given to the same person by the same will or the same codicil, if they are of the same amount, they are construed as only one bequest twice mentioned; but if they are of different amounts, they are held to be distinct legacies (f). **3024.**

PT. III. T. 15,  
CH. 3, s. 5.

Double legacies.

(a) 1 Rop. Leg. by White, 417.

(b) 1 Rop. Leg. by White, 418.

(c) 1 Rop. Leg. by White, 431  
—2; 3 & 4 Will. 4, c. 105, s. 12;  
*Stahlschmidt v. Lett*, 1 Sm. & Gif.  
421; *Roper v. Roper*, L. R. 3 Ch.  
D. 714.

(d) 2 Spence's Eq. Jur. 343; 1  
Rop. Leg. by White, 356.

(e) *Petre v. Petre*, 14 Beav.  
197; *Elwes v. Causton*, 30 Beav.  
554.

(f) 2 Rop. Leg. by White, 996,  
998.

PT. III.T.15,  
CH. 3, S. 5.

Where, in form, two legacies, even though of the same amount, are bequeathed to the same person by different testamentary instruments, namely, by two wills both admitted to probate, or by a will and a codicil, or by different codicils, two distinct legacies are thereby given, unless the double coincidence occurs of the same motive expressed and the same sum in both instruments; or unless the instrument giving the second legacy furnishes intrinsic evidence that the second legacy was merely given in lieu of the former (a); or unless the same amount is given to the same person by two codicils, executed on the same day, though expressed in somewhat different terms, but to the same effect, so as to have the appearance of duplicates, rather than as distinct codicils (b). **3025.**

To what a  
residuary  
legatee is  
entitled.

Where a residuary legatee is general legatee, he is entitled to whatever may not be disposed of in terms or in event (c). A residuary legatee of a partial residue will be entitled to interests which were a charge upon the partial residue, but lapse (d). **3026.**

## SECTION VI.

### *Of the Payment of Legacies.*

PT. III.T.15,  
CH. 3, S. 6.

In what  
currency.

Legacies are to be paid in the currency of the country in which the testator is domiciled and the will is made (e). **3027.**

Legacies to  
be paid  
within a  
year.

The executor is not obliged to pay, nor can he in many cases safely pay, the legacies sooner than a year after the testator's decease, although the testator may

(a) 2 Rop. Leg. by White, 999, 1008, 1012; *Russell v. Dickson*, 4 H. L. Cas. 293; *Townsend v. Mostyn*, 26 Beav. 72; *Tuckey v. Henderson*, 33 Beav. 174; *Creswell v. Creswell*, L. R. 6 Eq. 69; *Wilson v. O'Leary*, L. R. 12 Eq. 525; 7 Ch. Ap. 448.

(b) *Whyte v. Whyte*, L. R. 17 Eq. 50.

(c) 2 Rop. Leg. by White, 1673; 1 Jarm. Wills, 2nd ed. 654.

(d) 2 Rop. Leg. by White, 1683 1684.

(e) 1 Rop. Leg. by White, 856.

have directed them to be discharged within six months after his death (a). **3028.**

Pr. III.T.15,  
Ch. 3, s. 6.

When there are contingent liabilities that may create demands upon the assets of the testator, a Court of Equity will not oblige the executor to part with the fund without a sufficient security for his indemnity against legal consequences (b). But executors bringing facts plainly before the Court and distributing the assets under its direction are absolutely protected against any future claims; and the only remedy of a creditor, on covenant or otherwise, is against the legatees (c). **3029.**

Right to  
indemnity  
on payment

Where a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee, if he has an absolute indefeasible interest in the legacy, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge (d). **3030.**

Right to  
payment,  
notwith-  
standing  
direction to  
accumulate  
or to post-  
pone pay-  
ment.

If a legacy is given to A., to be paid at twenty-one, and A. dies before that period, his representative must wait for the money until A., if living, would have attained twenty-one, if intermediate interest is not given, but not if intermediate interest is given (e). **3031.**

Death of  
legatee  
before time  
for payment.

## SECTION VII.

### *Of the Income or Interest of Property bequeathed.*

Specific legacies are considered as severed, for the benefit of the legatee, from the bulk of the testator's property, from his death; and hence interest is computed

Pr. III.T.15,  
Ch. 3, s. 7.

Interest on  
specific  
legacies.

(a) 1 Rop. Leg. by White, 863;  
9 Jarm. & Byth. by Sweet, 834;  
11 Jarm. & Byth. by Sweet, 773.

of executors, see also stat. 22 & 23  
Vict. c. 35, s. 29.

(b) 1 Rop. Leg. by White, 865.  
On this subject see supra, par. 1815,  
1816.

(d) *Saunders v. Vautier*, 4 Beav.  
116; Cr. & P. 240; *Roche v. Roche*,  
9 Beav. 66; *Re Young's Settlement*,  
18 Beav. 199; *Gosling v. Gosling*, 1  
Johns. 265.

(c) *Bennett v. Lytton*, 2 Johns. &  
Hem. 155. And as to the protection

(e) 1 Rop. Leg. by White, 868, 871.

Pr. III. T. 15,  
Ch. 3, s. 7.

on them from that time, even where the enjoyment of the principal is postponed (a). **3032.**

General rule  
as to interest  
on general  
legacies.

Where no  
time for  
payment is  
fixed.

General legacies out of personalty usually carry interest only from the period when they become payable (b). Where no time of payment of general legacies is named by the testator, there, in the absence of any contrary intention to be collected from the will itself, they shall be paid at the expiration of one year next after his death; and if the executor then omits to pay them, the legatees will be entitled to interest from that period, though actual payment at that time may be impracticable (c). This rule applies to legacies under an appointment by a femme covert (d), and even to legacies given for the purchase of mourning rings (e). And a direction to pay "as soon as possible" does not exclude the application of the general rule (f). And a general legatee of Long Annuities is not entitled to dividends accruing before the expiration of a year from the testator's decease (g). Where a time of payment of general legacies is named by the testator, and such legacies are not of a residue, there, with some exceptions, the legacies will not carry interest before the arrival of the appointed time of payment, even though they be vested; but when that period arrives, the legatees will be entitled, although the legacy be charged upon a dry reversion (h). **3033.**

Where a  
time for  
payment is  
fixed.

Exceptions  
to general  
rule.

The rule which postpones a legatee's title to interest until the end of a year, or any other prescribed period of payment, admits of exceptions, where there is an indication of a contrary intention in the will, or where legacies

(a) 2 Rep. Leg. by White, 1245 ;  
11 Jarm. & Byth. by Sweet, 774.

(b) 11 Jarm. & Byth. by Sweet,  
773.

(c) 2 Rep. Leg. by White, 1245.

(d) *Tatham v. Drummond*, 2 Hem.  
& Mil. 262.

(e) 11 Jarm. & Byth. by Sweet,  
504.

(f) 11 Jarm. & Byth. by Sweet, 773.

(g) *Collyer v. Ashburner*, 2 De  
G. & S. 404.

(h) 2 Rep. Leg. by White, 1253,  
1816.

are bequeathed in satisfaction of debts, or where a legacy is given by a parent to his child, or by a person in loco parentis, and no provision is made by him for the child's maintenance (a), or by a person who, though not in loco parentis, has empowered his executors to apply it, or the income of it, for the maintenance or benefit of the legatee (b). **3034.**

Pr. III. T. 15,  
Ch. 3, s. 7.

Legacies charged primarily on real estate bear interest from the testator's death (c). But where real estate is to be sold, and legacies paid out of the proceeds, they will carry interest from the period of a year from the testator's death, as a reasonable time to allow for the sale (d). **3035.**

Legacies  
charged on  
real estate.

Where there is no direction for accumulation, the tenant for life of a residue is entitled from the death of the testator to the income of all such parts of the residue as are in a state of investment in accordance with the directions of the will (e). And where a residue is directed to be laid out in land, to be settled on one for life, with remainder over, and the testator directs the interest to accumulate in the meantime, the accumulation will cease at the end of the year from the testator's death, and from that period the tenant for life will be entitled to the interest (f). **3036.**

Income of a  
settled  
residue.

## SECTION VIII.

### *Of Bequests generally (g).*

A bequest for the promotion of an object which would not be consistent with our amicable relations with a

Pr. III. T. 15,  
Ch. 3, s. 8.

Bequest

(a) 11 Jarm. & Byth. by Sweet, 773; 2 Rep. Leg. by White, 1290; *Donovan v. Needham*, 9 Bear. 164; *Palmer v. Flower*, L. R. 13 Eq. 250.

(b) *In re Richards*, L. R. 8 Eq. 119.

(c) 11 Jarm. & Byth. by Sweet,

773; 2 Bl. Com. 513.

(d) *Turner v. Buck*, L. R. 18 Eq. 301.

(e) 2 Rep. Leg. by White, 1321—2.

(f) 2 Rep. Leg. by White, 1336.

(g) As to gifts to superstitious uses, see Boyle on Charities, 242 et

Pr. III.T.15,  
Ch. 3, s. 8.

contrary to  
public  
policy.

foreign state is void: as in the case of a bequest towards the political restoration of the Jews to Jerusalem (a). **3037.**

So also is a bequest tending to protect persons from the consequences of crimes which they have committed, or otherwise to encourage offences against the law (b). **3038.**

So also is a bequest for a purpose which is to endure for ever, other than a charitable bequest. On this principle it has been held that a bequest of money in trust to keep up the tomb of the testator and his family is void, as being a perpetuity (c); but that a bequest in trust to keep in repair a monument in the church and a memorial window is a good charitable bequest (d). **3039.**

Legacy for  
particular  
purpose.

Where a legacy is given, and the application of it is prescribed by the testator himself, or left by him to the discretion of some other person, if that discretion is not exercised, or circumstances prevent the employment of it in the way which is contemplated, the gift prevails. The mode of application may fail, but that will not interfere with the substance of the gift (e). And if a bequest is made to or in trust for a legatee, for a particular purpose (as, to put him out apprentice or to advance him in a business or profession), it is an absolute bequest to him, so that he will be entitled to the pay-

seq. ; 1 Jarm. Wills, 2nd ed. 170—173 ; *Heath v. Chapman*, 2 Drew. 417 ; and *supra*, par. 732.

(a) *Habershon v. Vardon*, 4 De G. & S. 467.

(b) *Thrupp v. Collett*, 26 Beav. 125.

(c) *Richard v. Robson*, 31 Beav. 244 ; *Fowler v. Fowler*, 33 Beav. 616 ; *Hoare v. Osborne*, L. R. 1 Eq. 585 ; *Fisk v. Att.-Gen.*, L. R. 4 Eq. 521 ; *Hunter v. Bullock*, L. R. 14 Eq. 45 ; *Danson v. Small*, L. R. 18 Eq. 114 ; *In re Williams*, L. R. 5 Ch. D. 735 ; *In re Birkett*, L. R. 9

Ch. D. 576, 579. Such a decision may be thought to be only in keeping with not a few others, which consist (in the author's opinion) in carrying out an abstract and often a purely metaphysical principle, at the expense of justice, reason, and common-sense, and ought to be swept away with a strong hand. "Apices juris non sunt jura."

(d) *Hoare v. Osborne*, L. R. 1 Eq. 585.

(e) 1 Rep. Leg. by White, 646 ; 1



ment of it before it is required for the purpose mentioned and, if he dies before it has been so paid or applied, it will form part of his personal estate (a). But where a discretion is reposed in trustees, both as to the propriety of raising the money, and as to the amount, there, if the legatee dies before the discretion is exercised, the legacy fails (b). **3040.**

Pt. III. T.15,  
CH. 3, s. 8.

When a certain and determinate period is appointed for the payment of a legacy, and it is given over upon the happening of a contingent event, the divesting clause is to be confined within the time when the legacy is payable; for otherwise it could not operate until the money might have been received and spent (c). **3041.**

Operation of  
a divesting  
clause  
restricted to  
a period  
prior to  
the time  
appointed  
for payment.

Jarm. Wills, 2nd ed. 326; Lord Cottenham, C., in affirmance of the decision of *Shadmell*, V. C. E., *Gough v. Bulk*, 16 Sim. 54; *Earl of Lonsdale v. Countess of Berchtoldt*, 3 K. & J. 185; *Re Skinner's Trusts*, 1 Johns. & Hem. 102.

(a) 2 Rep. Leg. by White, 1496; 2 Spence's Eq. Jur. 462.

(b) *Comper v. Mantell*, 22 Beav. 231.

(c) 1 Rep. Leg. by White, '797, 822—3.



## PART IV.

Of certain Persons and miscellaneous Heads of  
 Law connected with Conveyancing.

### TITLE I.

OF CERTAIN PERSONS CONNECTED WITH CONVEYANCING.

#### CHAPTER I.

OF EXECUTORS AND ADMINISTRATORS (*a*).

**A**N executor is the person to whom a testator commits the execution of his will. **3042.**

PART IV.  
T. 1, CH. 1.

All who are capable of making wills are capable of being appointed executors, and many others besides, as **Who is an executor.**  
**Who may be executor.**  
 femmes covert and infants, and even infants unborn or in ventre sa mere. But by the stat. 38 Geo. 3, c. 87, s. 6, no person who is sole executor can act as such till the age of twenty-one years (*b*). **3043.**

The appointment of an executor may be made either by express words, or by plain implication. **3044.**

How an executor may be appointed.

If the testator makes his will without naming any executor, or if he names incapable persons, or if the executors named refuse to act, administration cum testamento annexo must be granted to some other person (*c*). **3045.**

Administration cum testamento annexo.

(*a*) On this subject the reader is referred to The Right Hon. Sir Edward Vaughan Williams's valuable work.

(*b*) 2 Bl. Com. 503 ; 1 Wms. on Exors. 4th ed. 189 ; Watk. Conv. 3rd ed. by Prest. 248.

(*c*) 2 Bl. Com. 503.

PART IV.  
T. 1, CH. 1.Administra-  
tion durante  
minore  
ætate,  
durante  
absentia, or  
pendente  
lite.General  
administra-  
tion.To whom it  
is granted.

When a sole executor is under age, or is out of the realm, or where the validity of the will is contested in the Court, an administrator is appointed *durante minore ætate*, or *durante absentia*, or *pendente lite* (*a*). 3046.

There are some peculiar cases of property of a very small amount which, by certain statutes, is payable to the next of kin, without taking out any letters of administration (*b*). But with these exceptions, if the deceased died totally intestate, general letters of administration must ordinarily be granted to such administrator as the statutes 31 Edw. 3, c. 11, and 21 Hen. 8, c. 5, direct. And, 1. Administration of the goods and chattels of the wife must be granted to the husband or his representatives; and administration of the husband's effects to the widow or next of kin, or to both. 2. Among the kindred, those or some of those are to be preferred who are the nearest in degree to the intestate according to the Civil Law mode of computation (*c*), whether those of the paternal or maternal line, without distinction. Of persons in equal degree, there are some who are to be preferred; but subject to this, administration may be granted to any of them. Thus, in the first place, the children, or their lineal descendants, are entitled, or, if there are no issue, the father, or if no father, the mother of the deceased, is entitled. Then follow brothers or sisters, next grandfathers or grandmothers, then uncles or aunts or nephews or nieces, and, lastly, cousins. But the next of kin, in order to be entitled to administration, must have an interest in the property. 3. The half blood is admitted to the administration as well as the whole; for they are of the kindred of the intestate, and were only excluded from inheritances of land upon feudal reasons. Therefore, the brother of the half blood shall exclude

(*a*) 2 Bl. Com. 503; Wms. on Exors. 4th ed. 189.

Statute Law, tit. "Administration."

(*c*) See *supra*, par. 1259.

(*b*) See Stamp's Index to the

the uncle of the whole blood, and administration may be granted to the sister of the half or the brother of the whole blood. 4. If none of the kindred will take out administration, a creditor may by custom do it (*a*). **3047.**

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If the executor refuses or dies intestate, the administration may be granted to the residuary legatee, in exclusion of the next of kin (*a*). **3048.**

For default of these persons, the Court may commit administration (as it might have been done before the statute of Edw. 3) to such discreet person as it approves of, or may grant him letters ad colligendum bona defuncti, which neither make him executor nor administrator; his only business being to keep the goods in his safe custody, and to do other acts for the benefit of such as are entitled to the property (*b*). **3049.**

Letters ad  
colligendum  
bona  
defuncti.

Although the above are the general rules, yet by the stat. 20 & 21 Vict. c. 77, s. 73, the Court of Probate [now the Probate, Divorce, and Admiralty Division of the High Court of Justice] is empowered to grant administration to any person it may deem fit. **3050.**

Power to  
grant to  
other  
persons.

If a bastard, who has no kindred, being nullius filius, or any one else that has no kindred, dies intestate and without wife or child, the usual course now is for some one to procure letters patent or other authority from the Crown, and then the Court grants administration to him (*c*). **3051.**

Administra-  
tion where  
the deceased  
has no  
kindred.

By the old law, if all the goods lay within the same jurisdiction, a probate before the ordinary or an administration granted by him was the only proper authority. But if the deceased had bona notabilia or chattels to the value of a hundred shillings in two distinct dioceses or jurisdictions, then the will must have been proved or administration taken out, to save trouble and also uncer-

Diocesan  
probate or  
administra-  
tion.

Prerogative  
probate or  
administra-  
tion.

(*a*) 2 Bl.Com. 504, 505; 1 Wms.  
on Exors. 4th ed. 336—7.

(*b*) 2 Bl. Com. 505.

(*c*) 2 Bl. Com. 505.

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New Court  
of Probate.

Jurisdiction  
of the  
County  
Court.

Enactments  
as to pro-  
bates and  
administra-  
tions before  
the Act.

Several  
executors  
for different  
purposes or  
properties.  
Administra-  
tion limited  
to a particu-  
lar thing.

Transmis-  
sion of repre-  
sentation.

tainty to creditors and legatees, before the metropolitan of the province by way of special prerogative: whence the Courts where the validity of such wills was tried, and the offices where they were registered, were called the Prerogative Courts, and the Prerogative Offices, of Canterbury and York (*a*). But by the stat. 20 & 21 Vict. c. 77, the jurisdiction as to probate and letters of administration was vested in one new court, then called the Court of Probate [but now the Probate, Divorce, and Admiralty Division of the High Court of Justice]. By s. 54, however, where the personalty is under £200, and the real estate under £300, the County Court has the contentious jurisdiction. This section was repealed by s. 11 of the stat. 21 & 22 Vict. c. 95, but the above provision was re-enacted by s. 10. **3052.**

By the stat. 20 & 21 Vict. c. 77, s. 86, probates and administrations granted by Courts which had not jurisdiction are made valid, unless set aside by any Court. And by s. 87, probates and administrations before the Act are to have the same force and effect as if granted under the Act (*b*). **3053.**

A testator may appoint several executors for different purposes, and in respect of different parts of his property. And in like manner, an administrator may have only a limited or special administration committed to his care (*c*). **3054.**

The executor of a sole executor or sole surviving executor who has proved, is the executor and personal representative of the first testator; unless he refuses that office, which he may do, while he accepts that relating to the property of his own immediate testator, though not vice versâ. And so long as the chain of representation is unbroken by any intestacy, the ultimate executor

(*a*) 2 Bl. Com. 509, 510.

(*c*) Burton, § 977—8; 2 Bl. Com.

(*b*) See Jebb's Probate Act, p. 15. 506.

is the representative of every preceding testator, because the power of an executor is founded upon the special confidence and actual appointment of the deceased, and such executor is therefore allowed to transmit that power to another in whom he has equal confidence. But the administrator of an executor is not the representative of the testator; because he was merely the officer of the ordinary or metropolitan, in whom the deceased executor had reposed no trust at all. [For the same reason, on the death of an administrator testate (or intestate), no authority can be transmitted by him to his executor (or administrator). And, in order to effect a representation of the intestate (or first intestate), an administrator de bonis non must be appointed. But the executor of the administrator may be appointed the administrator de bonis non, as having the greatest interest in the effects.] And the executor of a deceased executor does not at all represent the original testator, where such deceased executor has left a co-executor him surviving. For, in such case, the representation devolves on the surviving co-executor, if he proved in the lifetime of the deceased executor. And if he has not proved in the lifetime of the deceased executor, and does not choose to prove after he becomes the survivor (as he might formerly do, even though he had renounced), or if a sole executor or sole surviving executor dies after probate, intestate, or if a sole or sole surviving administrator dies, whether testate or intestate, an administration de bonis non is granted, that is, an administration of the goods of the original testator or intestate left unadministered (a). 3055.

Administra-  
tion de bonis  
non.

An executor may contract and do many acts before he proves the will, but an administrator may do nothing till letters of administration are issued; for the former

Acts before  
probate or  
administra-  
tion.

(a) Wms. on Exors. 4th ed. 207 —209, 387—390; 2 Bl. Com. 506; Burton, § 962—970; 3 Jarm. & Byth. by Sweet, 709; see infra, par. 3086.

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derives his power from the will, and not from the probate; while the latter derives his title entirely from his appointment as administrator, though his title related back to the time of the intestate's decease (*a*). An executor, before probate of the will, may release a debt or duty due to the testator. But the release cannot be given in evidence until the will has been rendered authentic by probate or letters of administration (*b*). 3056.

Personalty  
vests in the  
executors,  
who thereby  
become  
liable to  
creditors  
and legatees.

The whole personal property vests in the executor (*c*), so that the demands of creditors and legatees are personal upon the executor; and though they exist in respect of the property, and are limited by the extent of it, yet they are no lien upon it, whether in his hands or in the hands of his assignees (*d*), where they are not affected with fraud 3057.

If an executor has, except under the direction of the Court, or except in the case provided for by the stat. 22 & 23 Vict. c. 35, s. 29, paid away the residue in ignorance of the existence of any debt, he is still liable for it. But an executor fairly stating the facts, and paying over the assets under the direction of the Court, in an administration suit, is fully indemnified against all existing or contingent demands on the estate (*e*). And by the stat. 22 & 23 Vict. c. 35, s. 29, "where an executor or administrator shall have given such or the like notices, as in the opinion of the Court in which such executor or administrator is sought to be charged would have been given by the Court of Chancery in an administration suit, for creditors and others to send in to the executor or administrator their claims against the estate of the

(*a*) 2 Bl. Com. 507; Broom's Com. 2nd ed. 593.

(*b*) 2 Pres. Shep. T. 334; Co. Litt. 292 b.

(*c*) 1 Wms. on Exors. 4th ed. 546.

(*d*) See Co. Litt. 290 b, n. (1),

xiv. 1; *In re Fells, Ex parte Andrews*, L. R. 4 Ch. D. 509.

(*e*) 2 Sp. Eq. Jur. 951; *Waller v. Barrett*, 24 Beav. 413; *Williams v. Headland*, 4 Gif. 495; but see *supra*, par. 1815, 1816.



testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices or the last of the said notices for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets or a part thereof, as the case may be; but nothing in the present Act contained shall prejudice the right of any creditor or claimant to follow the assets or any part thereof into the hands of the person or persons who may have received the same respectively." And an executor has the same protection under this Act as under a decree (a). **3058.**

Executors of a tenant in fee simple are entitled to the corn growing at his death, as against his heir, but not as against his devisee (b). **3059.**

Emble-  
ments.

A devise of land to executors to sell passes the estate in it; but a devise that executors shall sell it, or that it shall be sold by the executors, gives them a power only (c). **3060.**

Where  
executors  
take an  
estate, and  
where only  
a power.

Where executors take the residue in the character of executors, they take the same as joint tenants. And hence if one of them dies before the testator, the survivors are entitled to the whole property (d). But where there are several executors who all prove the will, they have not only a joint but also a several interest in all the goods and chattels of the testator. Hence, a sale

Where  
executors  
take a joint  
and several  
interest, but  
administra-  
tors do not.

(a) *Clegg v. Rowland*, L. R. 3 Eq. 368.

(b) Co. Litt. 55 b, n. (2); 2 Pres. Shep. T. 472; *Cooper v. Woolfit*, 2 Hurl. & Norm. 122.

(c) 1 Sugd. Pow. 131—134; *Doe d. Hampton v. Shotton*, 8 Ad. & E. 905.

(d) 1 Rep. Leg. by White, 484; 1 Wms. on Exors, 4th ed. 208.

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or release by one of them is good. But it is otherwise in the case of administrators (*a*). It is the usual practice, however, to require the concurrence of all the executors, in order to guard against the possible event of a sale having been made by any other executor, and, in the case of an assignment of a term, in order that the purchaser may have the benefit of a covenant from all the executors that they have not incumbered (*b*). **3061.**

Rights of  
executors or  
administra-  
tors to  
damages,  
covenants,  
or duties.

Executors and administrators represent the testator, and are entitled to all damages which accrued to the testator in his lifetime, and to the benefit of all covenants with and duties to the testator, except those duties which concern acts to be done to the testator personally in respect of his person, and which become impossible of performance by his death, or which are to be done for creating a title to be communicated to the heir (*c*). **3062.**

Right of  
retainer ;

An executor or administrator has a right to retain out of legal assets the amount of a debt due to him, either beneficially or as trustee, as against creditors of equal degree (*d*). **3063.**

or payment  
of debts,  
though  
barred.

An executor may pay a debt justly due to another person, although barred by the Statute of Limitations in the testator's lifetime. And he may retain a debt due to himself, although so barred (*e*). **3064.**

Power of one  
executor to  
settle an  
account.

One of two or more executors may settle an account with a person who is accountable to the estate, so as to bind the others and the estate; subject to any question of his liability to the parties beneficially interested for any impropriety of conduct; and subject to this also,

(*a*) 1 Cruise T. 8, c. 1, § 27 ; 2 Pres. Shep. T. 303, 335 ; 9 Jarm. & Byth. by Sweet, 802 ; 2 Bl. Com. 510.

(*b*) 9 Jarm. & Byth. by Sweet, 138.

(*c*) 1 Pres. Shep. T. 175.

(*d*) 2 Wms. on Exors. 4th ed. 894 —904 ; *Boyd v. Brooks*, 34 Beav. 7.

(*e*) 2 Wms. on Exors. 5th ed. 1635 ; *Stahlschmidt v. Lett*, 1 Sm. & G. 415 ; *Hill v. Walker*, 4 K. & J. 176.

that if there is any fraud or gross error in the settlement of account, it may be a ground for reopening it (a). **3065.**

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As the law vests all the chattels real and personal of a testator in the executor, to be applied by him, in the first place, in payment of debts; so every legatee must obtain the executor's assent to his legacy before his title as legatee can be complete (b). So that, whenever a term for years is devised, the consent of the executor is necessary to complete the title of the devisee, as in the case of any other legacy (c). **3066.**

Necessity  
for assent to  
a legacy, or  
to a devise of  
a term of  
years.

Any expression or act done by the executor which shows his concurrence in a bequest will amount to an assent (d). **3067.**

Assent of  
executors,  
how  
signified.

One executor is competent to assent to a legacy (e). **3068.**

Assent by  
one  
executor.

If an executrix is a married woman, the assent of her husband to a legacy will be sufficient; as the law authorises him to administer in right of his wife (f). **3069.**

Assent by  
husband of  
executrix.

Where a legacy is limited to several persons in succession, the executor's assent to the first taker will be considered an assent to the quasi remainder or remainders. And, on the other hand, his assent to a quasi remainder will enure to the benefit of any person taking a prior interest in the property bequeathed (g). **3070.**

Assent in  
cases of  
legacy  
limited by  
way of quasi  
remainder.

It is the duty of executors to assent as soon as all the debts and expenses attending the administration have been satisfied, and there is sufficient residue to pay all the legacies (h). **3071.**

When assent  
should be  
given.

(a) *Smith v. Everett*, 27 Beav. 446, 454.

*Stevenson v. Mayor of Liverpool*, L. R. 10 Q. B. 81.

(b) 2 Wms. on Exors. 4th ed. 1175, 1176.

(e) 9 Jarm. & Byth. by Sweet, 138; 1 Rep. Leg. by White, 844—5.

(c) 6 Cruise T. 38, c. 3, § 6; *Stevenson v. Mayor of Liverpool*, L. R. 10 Q. B. 81.

(f) 1 Rep. Leg. by White, 846.

(d) 4 Jarm. & Byth. by Sweet, 185; 2 Wms. on Exors. 4th ed. 1178; 1 Rep. Leg. by White, 846;

(g) 1 Rep. Leg. by White, 849; 6 Cruise T. 38, c. 3, § 6; *Stevenson v. Mayor of Liverpool*, L. R. 10 Q. B. 81.

(h) 1 Rep. Leg. by White, 854.

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Effect of  
assent.

Effect of  
appointing  
creditor or  
debtor, or  
obligee or  
obligor, to be  
executor or  
administra-  
tor.

By assent, the legal interest which the executor had in the fund ceases, and the entire property legal and equitable becomes vested in the legatee (*a*). 3072.

If an obligee or creditor makes a sole or joint obligor or debtor his executor or one of his executors, the obligation or debt is released at law, except as against creditors. But in equity the executor is converted into a trustee of the debt for the parties interested in the estate, whether as creditors, legatees, or persons claiming under the Statute of Distributions. The executor, as executor, is deemed to have received the debt from himself, as obligor or debtor, and to be answerable for it as assets in his hands (*b*). On the other hand, if a sole or joint debtor appoints his obligee or creditor to be his executor or one of his executors, and he proves the will or acts as executor, and he has assets to pay the debt, the debt is extinguished at law, upon the principle that he is supposed to have paid himself out of those assets (*c*). 3073.

The granting of letters of administration to an obligor or debtor, is only a suspension of the obligation (*d*). 3074.

Carrying  
on the  
testator's  
business.

It is a rule, without exception, that to authorize executors to carry on a trade, or to permit it to be carried on with the property of the testator held by them in trust, there ought to be the most distinct and positive authority and direction given by the will for that purpose (*e*). A direction that the testator's trade shall be carried on, does not of itself authorize the employment in the trade of more of the testator's property than was employed in it at the time of his

(*a*) 1 Rop. Leg. by White, 844.

(*b*) 2 Wms. on Exors. 5th ed. 1180—5; 2 Spence's Eq. Jur. 296; 2 Pres. Shep. T. 335, 395.

(*c*) 2 Wms. on Exors. 5th ed. 1186—7.

(*d*) 2 Wms. on Exors. 5th ed. 1183; 2 Pres. Shep. T. 395.

(*e*) *Kirkman v. Booth*, 11 Beav. 280

decease; or at all events it does not authorize a mortgage of his real estate not employed at his death in the trade, for the purpose of carrying it on (a). **3075.**

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[An executor or trustee carrying on the business of his testator, is personally liable for debts incurred by him in carrying on the business; and may indemnify himself out of the testator's estate generally, or only out of the specific assets directed to be employed in carrying on the business, in case of such a direction. And the creditors of the trade are entitled to stand in the place of the executor or trustee and to claim the benefit of his right of indemnity, so as to obtain payment of their debts. But where the executor or trustee is in default to the specific estate devoted to the trade, he cannot claim indemnity except upon terms of making good his default, and the creditors of the trade are in the same position with respect to the testator's estate (b).] **3075a.**

Sales or mortgages by executors or administrators of the personal property, whether specifically bequeathed or not, are ordinarily valid, notwithstanding it may be affected with some peculiar trust or equity in their hands; for the purchaser or mortgagee cannot be presumed to know that the sale or mortgage may not be required in order to discharge the debts of the testator to which they are legally liable before all other claims. And an executor may assign to a creditor, and give him a power of attorney to collect debts. In like manner an executor, who is also a devisee of an estate charged with the payment of debts, may be presumed by a bonâ fide purchaser or mortgagee of the estate (without notice of any intended misapplication) to be dealing with it for the purpose of the administration, and may give a valid title to it. But if a creditor or other person seeking to impeach the

Sales or  
mortgages  
by executors  
or adminis-  
trators.

(a) *McNeillie v. Acton*, 4 D. M. & G. 748.

(b) *In re Johnson, Shearman v. Robinson*, L. R. 15 Ch. D. 548.

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sale or mortgage proves—and on him rests the onus probandi—that the purchaser or mortgagee knew that the executor or administrator was converting the estate for an unlawful purpose, the purchase or mortgage will be set aside (*a*). **3076.**

The purchase, from an executor, of a particular chattel specifically bequeathed, cannot be recommended, without the concurrence of the legatee, because the executor may have assented to the bequest (*b*). **3077.**

Where  
executors  
are empow-  
ered to sell,  
and one or  
some will  
not act.

By the stat. 21 Hen. 8, c. 4, where lands are willed to be sold by executors, though some of them refuse to act, yet the rest may sell (*c*). And though the letter of the law extended only to cases where executors had a bare power to sell, yet, being a beneficial act, it has been by construction extended to the case of lands devised to executors to be sold (*d*). And it applies to copyholds, and to the case of devisees in trust who are named as executors in a subsequent part (*e*); at least where the proceeds, as to all or some of the purposes to which they are to be applied, are distributable by the executors in that character, as in payment of debts (*f*). **3078.**

Right of  
executors to  
undisposed-  
of residue

Testators not unfrequently appoint executors, without making any express disposition of the residue of their personal estate. Executors so appointed become by law entitled to the whole residue of such personal estate. And before the stat. 1 Will. 4, c. 40, Courts of Equity so far followed the law as to hold such executors to be entitled to retain such residue for their own use, unless

(*a*) Story's Eq. Jur. § 422, 423, 580, 581; 1 Rop. Leg. by White, 434—5; *Earl Vane v. Rigden*, L. R. 5 Ch. Ap. 663; *Corser v. Cartwright*, L. R. 8 Ch. Ap. 971; 7 H. L. 731.

(*b*) Sugd. Concise View, 526—7.

(*c*) 1 Sugd. Pow. 142; Burton, § 236, 974—5.

(*d*) 6 Cruise T. 38, c. 16, § 24;

Burton, § 976; 9 Jarm. & Byth. by Sweet, 429.

(*e*) Wms. on Exors. 5th ed. 856; Sugd. V. & P. 13th ed. 547; *Peppercorn v. Wayman*, 5 De G. & Sm. 230, affirmed by the Lords Justices.

(*f*) See 1 Chitty's Statutes, 1127; and *Peppercorn v. Wayman*, 5 De G. & Sm. 230; *Denne d. Bowyer v. Judge*, 11 East 289.

it appeared to have been their testator's intention to exclude them from the beneficial interest therein; in which case they were held to be trustees for the person or persons (if any) who would be entitled to such estate under the Statute of Distributions, if the testator had died intestate. By the stat. 1 Will. 4, c. 40, after reciting these circumstances, and that it was desirable that the law should be extended in that respect, it is enacted, "that when any person shall die after the first day of September next after the passing of this Act (July 16, 1830), having, by his or her will, or any codicil or codicils thereto, appointed any person or persons to be his or her executor or executors, such executor or executors shall be deemed by Courts of Equity to be a trustee or trustees for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions, in respect of any residue not expressly disposed of, unless it shall appear by the will or any codicil thereto that the person or persons so appointed executor or executors was or were intended to take such residue beneficially." But by the 2nd section it was enacted, "that nothing herein contained shall affect or prejudice any right to which any executor, if this Act had not been passed, would have been entitled, in cases where there is not any person who would be entitled to the testator's estate under the Statute of Distributions, in respect of any residue not expressly disposed of." 3079.

The onus probandi, therefore, is on the parties opposing the executor in cases not within the stat. 1 Will. 4, c. 40, just as it is now thrown on the executor in cases within that Act. In the former class of cases there must appear to be an intention to exclude the executor from the beneficial interest; in the latter, to confer that interest upon him (a). But it must not be inferred from

(a) *Juler v. Juler*, 29 Reav. 34; *Harrison v. Harrison*, 2 Hem. & Mill. 237.

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this, that the position of an executor, in the former class of cases, is analogous to that of an heir at law of real estate, who takes what is undisposed of. An heir at law is the person whom the law, so far as it is uncontrolled by testamentary disposition, designates as the proper object of succession to the inheritance; and the maxim is, *melior est dispositio legis quam hominis*. And the next of kin stand in the same position as the heir at law as to realty. Each has a *prima facie* title, so that the person claiming against either of them must make out his title, by showing a valid disposition of the property. But the executor took the legal interest by virtue of an express appointment to the office of executor, and the beneficial interest attached to the legal interest in him, unless the will afforded sufficient evidence of an intention that he was to take in a fiduciary character; in which case the beneficial interest had a separate and independent existence, and, instead of attaching in him stood apart from his legal interest, and vested in the persons whom the testator had designated as the objects of his bounty, and who might be termed testamentary *cestuis que trust*; or, in default of those, then in the persons who had a statutory right grounded on the relationship to the testator, and who might be considered as the statutory *cestuis que trust* (a); or if there were no next of kin, then in the Crown (b). 3080.

Cases in which the residue is expressly disposed of, though it be by way of a gift of the whole property to the executors themselves, are not within the Act (c). 3081.

With regard to what is sufficient evidence of such in-

(a) *Ellcock v. Mapp*, 3 Cl. & F. 507—8; *Underwood v. Wing*, 4 D. M. & G. 633, 656, 659. & Gif. 241; *Read v. Steadman*, 26 Beav. 495.

(b) *Powell v. Merrett*, 1 Sm. Gif. 381; *Cradock v. Owen*, 2 Sm. (c) *Saltmarsh v. Barrett*, 29 Beav. 474; 3 D. F. & J. 279; *Williams v. Arkle*, L. R. 7 H. L. 606.



tention to exclude the executor, in cases not within the Act, "necessary implication or violent presumption," is not requisite: if there is a plain implication or a strong presumption of such an intention, the executor will be deemed a trustee. So that where a testator gave all his estate to A., his executors, administrators, and assigns, to and for certain uses, intents, and purposes, which he specified, and then appointed A. his executor, there, although the trusts did not exhaust the whole property, yet A. was invested with a fiduciary character as to the whole, and therefore he was excluded from taking beneficially as to any part of it (a). **3082.**

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In demises, and assignments, and devises of terms for years, and in assignments and bequests of chattels personal, it is usual, but not necessary, to add "executors and administrators," as words of limitation, analogous to "heirs" in the case of a fee simple. The whole term or the entire interest in the chattel personal will pass without naming them (b). And where a devise of a term or a bequest of other personal estate is made to a person, his executors and administrators, and he dies before the testator, the property cannot be claimed by his executors or administrators (c). **3083.**

Use of  
"executors  
and admi-  
nistrators"  
as words of  
limitation.

And if an interest for life is given to a person, with an ultimate limitation, subject to prior dispositions or to his appointment, to his executors and administrators, or executors, administrators, or assigns, the absolute interest so subject, vests in himself, if he survives the testator (d). And under a bequest to a female, whether married or single, for her separate use for her life, and after her decease, to such persons as she should appoint by deed or will, or by will, and in default of appointment, to her

(a) *Ellcock v. Mapp*, 3 Cl. & F. 492.

(b) Co. Litt. 42 a (9); Burton, § 849.

(c) 1 Rep. Leg. by White, 134.

(d) 1 Rep. Leg. by White, 134; *Webb v. Sadler*, L. R. 8 Ch. Ap. 419.

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executors, administrators, and assigns, as part of her personal estate, she is entitled, without executing any formal appointment, to an immediate transfer or payment to herself of the corpus of the fund (a). And where a bequest is made to such of a class as shall be living at the death of the tenant for life, and the executors or administrators of such of the class as shall then be dead having any child then living; it is not a gift to the next of kin, or to the executors or administrators beneficially, but to them in their representative and fiduciary character, as part of the personal estate of those whom they represent (b). **3084.**

Power to  
pay debts,  
compound,  
compromise  
or refer.

By the stat. 23 & 24 Vict. c. 145, s. 30 (c), "it shall be lawful for any executors to pay any debts or claims upon any evidence that they may think sufficient, and to accept any composition, or any security, real or personal, for any debts due to the deceased, and to allow any time for payment of any such debts as they shall think fit, and also to compromise, compound, or submit to arbitration all debts, accounts, claims, and things whatsoever relating to the estate of the deceased, and for any of the purposes aforesaid to enter into, give, and execute such agreements, instruments of composition, releases, and other things as they shall think expedient, without being responsible for any loss to be occasioned thereby." **3085.**

Power for  
executors  
and trustees  
to com-  
pound, etc.

[The above section is now repealed by stat. 44 & 45 Vict. c. 41 (Appendix), which enacts by s. 37—"(1) An executor may pay or allow any debt or claim on any evidence that he thinks sufficient. (2) An executor, or two or more trustees acting together, or a sole acting trustee where, by the instrument, if any, creating the trust, a sole trustee is authorized to execute the trusts

(a) *Holloway v. Clarkson*, 2 Hare 521; *Page v. Naper*, 11 Hare 321; *Cambridge v. Rous*, 25 Beav. 574.

(b) *Re Seymour's Trusts*, 1 Johns. 472.

(c) But see ss. 32—4, *infra*, par. 3125—7, 3127 a.

[and powers thereof, may, if and as he or they think fit, accept any composition, or any security, real or personal, for any debt, or for any property, real or personal, claimed, and may allow any time for payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith. (3) As regards trustees, this section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained. (4) This section applies to executorships and trusts constituted or created either before or after the commencement of this Act." **3085a.**

And by s. 38—" (1) Where a power or trust is given to or vested in two or more executors or trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being. (2) This section applies only to executorships and trusts constituted after or created by instruments coming into operation after the commencement of this Act." It is important to observe that this section does not empower the personal representatives or representative of the survivor of the two or more executors or trustees, to exercise or perform the power or trust, so that if this is intended, it should be so expressed in the instrument by which the power or trust is created.] **3085b.**

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Powers to  
two or more  
executors or  
trustees.

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executors, administrators, and assigns, as part of her personal estate, she is entitled, without executing any formal appointment, to an immediate transfer or payment to herself of the corpus of the fund (*a*). And where a bequest is made to such of a class as shall be living at the death of the tenant for life, and the executors or administrators of such of the class as shall then be dead having any child then living; it is not a gift to the next of kin, or to the executors or administrators beneficially, but to them in their representative and fiduciary character, as part of the personal estate of those whom they represent (*b*). **3084.**

Power to  
pay debts,  
compound,  
compromise,  
or refer.

By the stat. 23 & 24 Vict. c. 145, s. 30 (*c*), "it shall be lawful for any executors to pay any debts or claims upon any evidence that they may think sufficient, and to accept any composition, or any security, real or personal, for any debts due to the deceased, and to allow any time for payment of any such debts as they shall think fit, and also to compromise, compound, or submit to arbitration all debts, accounts, claims, and things whatsoever relating to the estate of the deceased, and for any of the purposes aforesaid to enter into, give, and execute such agreements, instruments of composition, releases, and other things as they shall think expedient, without being responsible for any loss to be occasioned thereby." **3085.**

Power for  
executors  
and trustees  
to com-  
pound, etc.

[The above section is now repealed by stat. 44 & 45 Vict. c. 41 (Appendix), which enacts by s. 37—" (1) An executor may pay or allow any debt or claim on any evidence that he thinks sufficient. (2) An executor, or two or more trustees acting together, or a sole acting trustee where, by the instrument, if any, creating the trust, a sole trustee is authorized to execute the trusts

(*a*) *Holloway v. Clarkson*, 2 Hare 521; *Page v. Soper*, 11 Hare 321; *Cambridge v. Rous*, 25 Beav. 574.

(*b*) *Re Seymour's Trusts*, 1 Johns. 472.

(*c*) But see ss. 32—4, *infra*, par. 3125—7, 3127 a.

[and powers thereof, may, if and as he or they think fit, accept any composition, or any security, real or personal, for any debt, or for any property, real or personal, claimed, and may allow any time for payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith. (3) As regards trustees, this section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained. (4) This section applies to executorships and trusts constituted or created either before or after the commencement of this Act." **3085a.**

And by s. 38—" (1) Where a power or trust is given to or vested in two or more executors or trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being. (2) This section applies only to executorships and trusts constituted after or created by instruments coming into operation after the commencement of this Act." It is important to observe that this section does not empower the personal representatives or representative of the survivor of the two or more executors or trustees, to exercise or perform the power or trust, so that if this is intended, it should be so expressed in the instrument by which the power or trust is created.] **3085b.**

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two or more  
executors or  
trustees.

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Renuncia-  
tion or  
neglect to  
take pro-  
bate.

By the stat. 20 & 21 Vict. c. 77, s. 79, where any person, after the commencement of this Act, renounces probate of the will of which he is appointed executor or one of the executors, the rights of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor. And by the stat. 21 & 22 Vict. c. 95, s. 16, "whenever an executor appointed in a will survives the testator, but dies without having taken probate, and whenever an executor named in a will is cited to take probate and does not appear to such citation, the right of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor." 3086.

## CHAPTER II.

OF TRUSTEES (*a*).

**EVEN** femmes covert and infants may be trustees (*b*). **3087.**

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It is a rule in equity, which admits of no exception, that, where a trust exists, a Court of Equity never wants a trustee. For, wherever a perfect trust, as opposed to a trust resting in contract or in fieri, or even an imperfect trust, if supported by a valuable consideration, has once attached, whether it is an express, an implied, or a constructive trust, and it is not extinguished by the counter-vailing equity of a bonâ fide purchaser for valuable consideration, without notice, or other person having a conflicting equity, nor has otherwise ceased to subsist, equity will follow the legal estate, and decree the person in whom it is vested to execute the trust (*c*). And the lapse of the legal estate never has the least influence on the trusts to which it is subject: if the individuals named happen to fail, by death, incapacity, or refusal, the Court will provide a trustee: if no trustees are appointed at all, the Court assumes the office in the first instance (*d*). **3088.**

Who may be trustees.

Equity never wants a trustee.

If a man appoints a trustee of real or personal estate, without naming his heir or personal representative, the heir or personal representative does not become a trustee, on the decease of the person so appointed, although the

Devolution or delegation of a trust.

(*a*) On this subject the reader is referred to the very valuable works of Mr. Lewin and Mr. Hill.

(*b*) 2 Spence's Eq. Jur. 32.

(*c*) See Story's Eq. Jur. § 976,

1159, 1162; 1 Spence's Eq. Jur. 501; 2 Id. 51, 52, 369, 875, 876; Co. Litt. 113 a, n. 2, 290 b, n. 1, VI.; 1 Cruise T. 12, c. 4, § 60.

(*d*) 2 Spence's Eq. Jur. 876.

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property may vest in the heir or representative. [And where two or more persons, and the survivor, and the heirs, executors, or administrators of the survivor, were appointed trustees, and the word "assigns" was not introduced, it has been held that the sole or surviving trustee could not delegate the trust either by act inter vivos, or by devise; for although he might thereby pass the legal estate, yet the person in whom it was thereby vested would not be clothed with the character of trustee (a). Hence, where a testator gave leaseholds to two trustees, their executors, and administrators, and the surviving trustee devised and bequeathed all trust estates to trustees, and appointed them and another person his executors, it was decided that neither the trustees nor the executors of such surviving trustee could execute the trusts, but new trustees must be appointed; because by the devise and bequest made by such surviving trustee, he had taken away the legal estate from his executors, who ought otherwise to have been the trustees (b). And where a testator devised estates to trustees, their heirs and assigns, upon trust to sell, and provided that "the receipts of his trustees or the survivors should be sufficient," and the surviving trustee devised the estates upon the same trusts, the cestuis que trust were declared to be entitled to have new trustees appointed of the original will (c). But in a recent case, where real estate was devised to trustees and "their heirs" (omitting "assigns") in trust for sale, it was held by Jessel, M. R., that the trust must be considered as annexed, not to the person, but to the fee simple estate taken by the trustees, so that the trust could be executed by the devisees of trust estates of the surviving trustee (d).

(a) 2 Spence's Eq. Jur. 38; *Cooke*  
v. *Crawford*, 13 Sim. 91.

(b) *In re Burt*, 1 Drew. 319.

(c) *Ockleston v. Heap*, 1 De G. &

S. 640.

(d) *Osborne to Rowlett*, L. R. 13

Ch. D. 774, overruling *Cooke v.*

*Crawford*.



[This decision, however, has since been doubted by the Lords Justices (a). **3089.**

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Now, however, on the death after the 31st of December, 1881, of a sole surviving, or, as the case may be, a sole trustee, the trust estates, notwithstanding any testamentary disposition he may have made, devolve to and vest in his personal representatives or representative, from time to time, with the like powers and obligations respecting such trust estates, as if the same were a chattel real vesting in them or him (b). But no provision is made to meet the case of the want of any personal representative, occasioned by neglect or delay in taking out administration to such a trustee on his intestacy, which in some cases may give rise to difficulty. In consequence of this change in the devolution of trust estates, the trusts and powers formerly given to the trustee, his heirs or assigns, should now be given to him, his executors, or administrators.] **3089a.**

A trustee cannot, without the consent of his cestui que trust or of the Court, denude himself of the character of trustee, until he has performed the trusts. If, without such consent, he assigns the trust, or delegates the performance of its duties to a stranger, he will be answerable for the breaches of trust committed by the assignee or stranger (c). **3090.**

It was the duty of trustees, executors, or administrators, to whom no discretion as to investments was given, to invest in Consols or Reduced or New £3 per Cents. **3091.**

Investment—

Trustees, executors, or administrators, having power to invest upon Government securities or upon parliamentary stocks, funds, or securities, may now invest in Bank Stock, East India Stock, Exchequer Bills, and £2 10s. per Cent.

under the  
stat. 23 & 24  
Vict. c. 38,  
and order of  
Feb. 1, 1861

(a) *In re Morton and Hallett*, L. R. 15 Ch. D. (Ap.) 143. stat. 44 & 45 Vict. c. 41, s. 30, in Appendix.

(b) See *supra*, par. 997 a, and (c) 2 Spence's Eq. Jur. 920.

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Annuities, and upon mortgage of freehold and copyhold estates in England and Wales (a). **3092.**

under stat.  
22 & 23 Vict.  
c. 35 ;

And by the stat. 22 & 23 Vict. c. 35, s. 32, "when a trustee, executor, or administrator shall not, by some instrument creating his trust, be expressly forbidden to invest any trust fund on real securities, in any part of the United Kingdom, or on the stock of the Bank of England or Ireland, or on East India Stock, it shall be lawful for such trustee, executor, or administrator to invest such trust fund on such securities or stock ; and he shall not be liable on that account as for a breach of trust, provided that such investment shall in other respects be reasonable and

as extended  
by the stat.  
23 & 24 Vict.  
c. 38. and by  
the stat.  
30 & 31 Vict.  
c. 132 ;

proper." This is only prospective (b). But by the stat. 23 & 24 Vict. c. 38, s. 12, this 32nd section "shall operate retrospectively." And by the stat. 30 & 31 Vict. c. 132, s. 1, it is enacted that "the words 'East India Stock' in the said Act passed in the session holden in the 22 & 23 Vict. c. 35, shall include and express as well the East India Stock which existed previously to the 13th day of August, 1859, when the said Act received the assent of Her Majesty, as East India Stock charged on the revenues of India, and created under and by virtue of any Act or Acts of Parliament which received Her Majesty's assent on or after the 13th day of August, 1859 ; and it shall be lawful for every trustee, executor, or administrator to invest any trust fund in his possession or under his control in the stock created by the last-mentioned Act or Acts to the same extent, and for the same purposes and objects, as he can now invest such trust fund in the East India Stock which existed previously to the 13th day of August, 1859." And by s. 2, "it shall be lawful for every trustee, executor, or administrator to invest any trust fund in his

(a) 23 & 24 Vict. c. 38, ss. 10, 11, and Gen. Ord. of Feb. 1, 1861 ; 9 Ch. D. 112.  
(b) *Re Miles' Will*, 27 Beav. 579.  
*In re Wedderburn's Trusts*, L. R.

possession or under his control in any securities the interest of which is or shall be guaranteed by Parliament, to the same extent and in the same manner as he may invest such trust fund in such securities as aforesaid." **3093.**

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And by the stat. 23 & 24 Vict. c. 145, s. 25 (a), "trustees having trust money in their hands which it is their duty to invest at interest shall be at liberty, at their discretion, to invest the same in any of the parliamentary stocks or public funds, or in Government securities, and such trustees shall also be at liberty, at their discretion, to call in any trust funds invested in any other securities than as aforesaid, and to invest the same on any such securities as aforesaid, and also from time to time, at their discretion, to vary any such investments as aforesaid for others of the same nature: provided always, that no such original investment as aforesaid (except in the £3 per Cent. Consolidated Bank Annuities), and no such change of investment as aforesaid, shall be made where there is a person under no disability entitled in possession to receive the income of the trust fund for his life, or for a term of years determinable with his life, or for any greater estate, without the consent in writing of such person." [This section is repealed by s. 71 (Appendix) of stat. 44 & 45 Vict. c. 41; but the repeal does not affect the validity or operation of any instrument executed, or of anything done or suffered, or of any action, proceeding, or thing, pending or uncompleted before the 1st of January, 1882.] **3094.**

and under  
stat. 23 & 24  
Vict. c. 145,  
s. 25;

[Capital money arising under stat. 45 & 46 Vict. c. 38, may be invested or applied in any one or more of the numerous investments and improvements specified in that Act (b).] **3095.**

and capital  
money  
under stat.  
45 & 46 Vict.  
c. 38.  
The Settled  
Land Act,  
1882.

By the stat. 34 Vict. c. 27 (passed the 29th of June, 1871), "Where a power has before the passing of this

Power to  
trustees to  
invest in  
debenture

(a) See infra, par. 3114, as to object of this Act; and see ss. 32, 33, 34, infra, par. 3125—7, 3127 a.

(b) See ss. 21—26, in Appendix.

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stock [under  
stat. 34  
Vict. c. 27.  
The Deben-  
ture Stock  
Act, 1871.]

Act been or shall at any time hereafter be given to trustees to invest trust funds in the mortgages or bonds of a railway company or of any other description of company, such power shall, unless the contrary is expressed in the instrument creating the power, be deemed to include a power to invest such funds in the debenture stock of a railway company or such other company as aforesaid, and an investment of trust funds in debenture stock may be made accordingly" (s. 1). **3096.**

Definition of  
"trustees."

"The expression 'trustees' shall include executors and administrators and any other persons holding funds in a fiduciary capacity" (s. 2). **3097.**

Improper  
invest-  
ments.

According to the general understanding of the profession, and the general practice of the Courts, where trustees are authorized to invest on mortgage of real estate, they are not justified in advancing more than two-thirds of the value of agricultural freeholds, or one-half of the value of freehold houses. [But this rule is not applied with mathematical exactness; and if trustees have acted as prudent business men in making advances, they are not chargeable in case of loss, although they have not kept strictly within the rule (a).] If the value depends upon fortuitous circumstances—for instance, if the property consists of a mill or factory, or other buildings used for purposes of trade, or houses situate in a watering-place or the like—the trustees run the risk of having the mortgage thrown upon themselves, and of being made answerable for the money advanced. In such cases, the burden of proof as to sufficient value lies upon the trustees (b). A power to invest trust funds "upon the security of the funds of any company" does not warrant their investment in preference

(a) *Re Godfrey*, *Godfrey v. Faulkner*, L. R. 23 Ch. D. 483.

(b) 2 Spence's Eq. Jur. 925; Coote Mortg. 3rd ed. 162; remarks of Sir J. Romilly, M. R., in *Macleod*

*v. Annesley*, 16 Beav. 605; *Stickney v. Sewell*, 1 My. & Cr. 15; *Stretton v. Ashmall*, 3 Drew. 9; *Budge v. Gummor*, L. R. 7 Ch. Ap. 719.

railway shares; for such an investment is not an investment on the security of the funds of a company, but a purchase of shares in the undertaking, or an investment secured on the profits of the concern (*a*). As a general rule, a trustee empowered to lend money upon real securities, is not entitled to lend money on mortgage of a leasehold estate (*b*). And an authority to invest trust moneys on real securities does not authorize an investment on London Docks Stock, Road Bonds, or Sewer Bonds (*c*). Nor does a power to invest on the security by way of mortgage of any freehold, copyhold, or leasehold hereditaments, authorize an investment in railway mortgages and railway debenture stock (*d*). And if trustees are empowered to lend money, even on personal security, and one lends a sum of money to the other upon a mortgage of his real estate, and the latter becomes bankrupt, and the estate when sold is insufficient, the trustee lending the money is liable for any loss occasioned by such an investment; because trustees ought not to lend to one another (*e*). **3098.**

[Trustees of a will invested trust moneys in an unauthorised purchase of land, and executed a declaration of trust declaring that they held the land upon the trusts of the will; and afterwards sold the land for an increased price. It was held that they were able to make a good title, if one cestui que trust, entitled to an aliquot part of the trust fund, concurred so as to prevent the election by all the cestuis que trust, to take the land. But the purchaser from the trustees should see that the purchase money is invested in proper securities upon the trusts of the will (*f*).] **3098a.**

(*a*) *Harris v. Harris* (No. 1), 20 Beav. 107.

(*b*) *In re Chennell, Jones v. Chennell*, L. R. 8 Ch. D. (Ap.) 492, 508.

(*c*) *Robinson v. Robinson*, 11 Beav. 371.

(*d*) *Mortimore v. Mortimore*, 4 D. & J. 472.

(*e*) *Stickney v. Sewell*, 21 My. & Cr. 8.

(*f*) *Patten v. Guardians of Edmonton*, 31 W. R. 785.

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Where a discretion is given to executors and others to invest money on securities generally, unless personal security is expressly or clearly implied, they ought not to invest the funds on personal security. And even where trustees are authorized to lend on such personal security as they shall think sufficient, they are not enabled to lend trust money to a trader or trading concern (*a*). And an indemnity clause, declaring that they shall not be liable for the insufficiency of any security, will not exonerate them from liability, if they lend on palpably inadequate security (*b*). **3099.**

It is a breach of trust to sell out stock, and invest the proceeds on a mortgage for securing the re-transfer of such stock, and the payment of interest equal to the amount of the dividends (*c*). **3100.**

Trustees are bound to invest on securities of a permanent nature. So that even where trustees have power to invest as they think fit, they may not invest upon securities which at the time are commanding a higher rate of interest in consequence of their being determinable (*d*). **3101.**

An executor will not be liable for money allowed to remain with bankers who fail, where it is not an unreasonable sum for executors to keep in the bank (*e*), or where it was right and reasonable for the money to be deposited there under the circumstances (*f*). But he will be liable if he places money in the hands of a banker by way of investment, notwithstanding an indemnity clause against losses by a banker of money deposited for safe custody (*g*). **3102.**

Power to

By the stat. 4 & 5 Will. 4, c. 29, s. 1, it is enacted, that

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|---|---|
| ( <i>a</i> ) 2 Rep. Leg. by White, 1500,            | Eq. 26.   |
| 1501; 2 Spence's Eq. Jur. 296, 926.                 | ( <i>e</i> ) <i>Swinfen v. Swinfen</i> (No. 5),     |
| ( <i>b</i> ) <i>Drosier v. Brereton</i> , 15 Beav.  | 29 Beav. 211.                                       |
| 221.  | ( <i>f</i> ) <i>Fenwick v. Clarke</i> , 4 D.F. & J. |
| ( <i>c</i> ) <i>Whitney v. Smith</i> , L. R. 4 Ch.  | 248.  |
| Ap. 513.  | ( <i>g</i> ) <i>Reyden v. Wesley</i> , 29 Beav.     |
| ( <i>d</i> ) <i>Stewart v. Sanderson</i> , L. R. 10 | 213.  |

from and after the passing of the Act, "it shall be lawful for any person or persons who, under or by virtue of any direction, trust, or power already given, created, or reserved or hereafter to be given, created, or reserved as aforesaid, is or are or shall be authorized or directed to lend money at interest on real securities in England, Wales, or Great Britain, to lend the same or any part thereof at interest on real securities in Ireland, in the same manner in all respects as if such investment had been expressly authorized in or by such direction, trust, or power as aforesaid," etc. But by s. 2, it is provided, "that all loans of money on real securities in Ireland under this Act, in which any minor or unborn child or person of unsound mind is or may be interested, shall be made by the direction and under the authority of the Court of Chancery or Exchequer in England, such direction or authority being obtained in any cause upon petition in a summary way." And by s. 5, it is further provided, "that the provisions of this Act shall not apply to any case in which such direction, trust, or power as aforesaid doth or shall or may contain any express restriction against the investment of such money as aforesaid on securities in Ireland." And by s. 6, "that nothing contained in this Act shall relieve or be construed to relieve any person or persons intrusted or clothed with such direction, trust, or power as aforesaid from any responsibility as to title, security, or otherwise, either at law or in equity, save that of having lent and advanced such money as aforesaid on real securities in Ireland, instead of having invested such money on real securities in England, Wales, or Great Britain." And hence, where upon a petition under this Act, the Court sanctioned an investment, which was made without proper evidence of value, and without the consent of the necessary parties, and there was a loss, the trustees were held liable for the breach of trust (a). 3103.

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lend money  
on real  
securities in  
Ireland.

(a) Shelford's Real Prop. Acts, 527.

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In a power to invest upon the stocks or funds of "any foreign governments," it should, in order to exclude doubts, be expressed, whether the power is to extend to the separate States as well as to the United States, as an aggregate (a). **3103a.**

Trustees  
must join in  
conveyances  
and receipts.

Trustees cannot act separately, but must all join both in conveyances and receipts. **3104.**

[Capital money arising under stat. 45 & 46 Vict. c. 38, must be paid to two persons as trustees of the settlement, unless the settlement authorizes the receipt of capital trust money of the settlement by one trustee (b).] **3104a.**

Responsi-  
bility for  
each other's  
acts and  
default.

A trustee is responsible for his own acts and defaults, and for those wrongful acts and defaults of his co-trustees to which he is privy, and in which, though without any corrupt motive, he expressly, tacitly, or virtually acquiesces, or which would not have happened but for his own act or default (c). [And it is enacted by stat. 45 & 46 Vict. c. 38, s. 41 (Appendix), that "each person who is for the time being trustee of a settlement is answerable for what he actually receives only, notwithstanding his signing any receipt for conformity, and in respect of his own acts, receipts and defaults only, and is not answerable in respect of those of any other trustee, or of any banker, broker, or other person, or for the insufficiency or deficiency of any securities, or for any loss not happening through his own wilful default." ] **3105.**

Trustee  
indemnity  
clause.

The trustee indemnity clause does not exonerate a trustee from this liability for a breach of trust committed by his co-trustee (d). The insertion of it leads many, in ignorance of this fact, to accept a trust, and many others to be so remiss as to give their co-trustees the opportunity of committing breaches of trust, through which they

(a) See *Cadett v. Earle*, L. R. 5 Ch. D. 710.

(b) See s. 39 of that Act, in Appendix.

(c) See Smith's Manual of Eq. 13th ed. par. 366.

(d) *Brumridge v. Brumridge*, 27 Beav. 5.



themselves are involved in a Chancery suit, though that often necessarily proves unavailing to remedy the loss occasioned to the cestuis que trust. **3106.**

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By the stat. 22 & 23 Vict. c. 35, s 31, "every deed, will, or other instrument creating a trust either expressly or by implication shall, without prejudice to the clauses actually contained therein, be deemed to contain a clause in the words or to the effect following; that is to say, 'that the trustees or trustee for the time being of the said deed, will, or other instrument shall be respectively chargeable only for such moneys, stocks, funds, and securities as they shall respectively actually receive, notwithstanding their respectively signing any receipt for the sake of conformity, and shall be answerable and accountable only for their own acts, receipts, neglects, or defaults, and not for those of each other, nor for any banker, broker, or other person with whom any trust moneys or securities may be deposited, nor for the insufficiency or deficiency of any stocks, funds, or securities, nor for any other loss, unless the same shall happen through their own wilful default respectively; and also that it shall be lawful for the trustees or trustee for the time being of the said deed, will, or other instrument to reimburse themselves or himself, or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trust or powers of the said deed, will, or other instrument.'" **3107.**

Every trust instrument to be deemed to contain clauses for the indemnity and reimbursement of the trustees.

[And by stat. 45 & 46 Vict. c. 38, s. 42 (Appendix), it is enacted that "The trustees of a settlement, or any of them, are not liable for giving any consent, or for not making, bringing, taking, or doing, any such application, action, proceeding, or thing, as they might make, bring, take, or do; and in case of purchase of land with capital money arising under this Act, or of an exchange, partition, or lease, are not liable for adopting any contract made by the tenant for life, or bound to inquire as to the propriety

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of the purchase, exchange, partition, or lease, or answerable as regards any price, consideration, or fine, and are not liable to see to or answerable for the investigation of the title, or answerable for a conveyance of land, if the conveyance purports to convey the land in the proper mode, or liable in respect of purchase-money paid by them by direction of the tenant for life to any person joining in the conveyance as a conveying party, or as giving a receipt for the purchase-money, or in any other character, or in respect of any other money paid by them by direction of the tenant for life on the purchase, exchange, partition, or lease." The first few lines of this section are similar to a clause sometimes inserted in settlements; but the greater portion of it is new, and most important.] 3107a.

Remunera-  
tion.

Trustees, executors, directors of private companies, and other persons standing in a similar situation, are not allowed, even with the consent of their co-trustees, co-executors, or coadjutors, and however extraordinary the services they may have rendered, to take any remuneration by way of commission, or brokerage, or salary, without some express or implied provision for that purpose in the instrument under which they claim (*a*). And a solicitor, who is a trustee, is not entitled to charge for business done by him in relation to the trust, as distinguished from costs out of pocket, although employed to do it by his co-trustee, unless there is a provision, in the deed or will creating the trust, enabling him to receive remuneration for the transaction of such business (*b*). And even where there is a provision that a solicitor is to be at liberty to charge for his professional services, he is only entitled to charge for services *strictly* professional, and not entitled to charge

(*a*) Story's Eq. Jur. § 466 a, 1268; 2 Spence's Eq. Jur. 945, 946; *Barrett v. Hartley*, L. R. 2 Eq. 789. (*b*) *Broughton v. Broughton*, 2 De G. & S. 422; 5 D. M. & G. 160.

for matters which an executor or trustee ought to have done without the intervention of a solicitor; such as for attendances to pay premiums on policies or to make transfers at the bank, attendances on proctors, auctioneers, legatees, and creditors (a). But trustees are entitled, without any express provision, to defray out of the trust funds expenses legitimately and properly incurred (b). [And stat. 45 & 46 Vict. c. 38, s. 43 (Appendix), enacts that "The trustees of a settlement may reimburse themselves or pay and discharge out of the trust property all expenses properly incurred by them." They may, however, be ordered to pay personally the costs of proceedings rendered necessary by their vexatious conduct (c).] 3108.

A Court of Equity will not in any case permit a trustee or other person standing in a fiduciary relation to derive any benefit from the property with which he is intrusted or from the office itself. If a trustee or other person standing in a fiduciary relation acquires property or makes a profit by means of transactions within the scope of his agency or authority, or if a person employs another's property in any trade or speculation, there will be a constructive trust as to the property so acquired or the profits thereby made, for the benefit of the cestui que trust, principal, owner, or other person standing in the opposite relation (d). Therefore, if a trustee compounds a debt for less than is due, he shall not derive any advantage to himself from the transaction (e). And if a trustee purchases a lien or mortgage on a trust estate at a discount, he will not be allowed the benefit of the difference, but the purchase will be a trust for the cestui que trust. So, if a trustee or a partner renews a lease of the trust or partnership estate,

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Expenses.

a Persons in  
a fiduciary  
relation not  
allowed to  
derive a  
benefit.

(a) *Hurbin v. Darby* (No. 1), 28 Beav. 325.

(b) 2 Spence's Eq. Jur. 938.

(c) *In re Knight's Trusts*, 32 W.R. 336.

(d) 1 Cruise T. 12, c. 4, § 38.

See Story's Eq. Jur. § 1211, 1211 a, 1261; 1 Spence's Eq. Jur. 512; 2 Spence's Eq. Jur. 208, 299, 300; *Sugden v. Crossland*, 3 Sm. & Gif. 192.

(e) 1 Cruise T. 12, c. 4, § 38.

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he will be a trustee of such renewed interest for his cestui que trust or co-partner, even though the lessor may have refused to grant a renewal to the cestui que trust or co-partner (*a*). 3109.

Wrongful  
conversion  
of trust pro-  
perty.

In general, whenever property of one kind has been wrongfully converted into property of another kind, by a trustee or agent, if the property which has been so substituted can be ascertained to be such, it will be liable to the rights of the cestui que trust or principal, to which the property converted was subject (*b*). 3110.

Conveyance,  
assignment,  
or charge by  
a trustee in  
violation of  
his trust.

A trust may be extinguished by a transfer of the funds on the trusts of an ante-nuptial settlement, where either the husband or wife was not aware that the party transferring them had no power to do so (*c*). And if a trustee conveys the trust property to a bonâ fide purchaser for valuable consideration, who has paid his purchase money, and had no notice of the trust at the time of paying the same, the trust is extinguished. But if the trustee should afterwards repurchase or otherwise become entitled to the same property, the trust would be revived by construction of equity (*d*). A purchaser has no right to a conveyance from trustees where they had no right to sell at all, or not in the way in which they did sell, and where the purchaser was aware of that circumstance before he paid his purchase money (*e*). And if a trustee conveys or assigns the trust property for valuable consideration, in violation of the trust, to a person who is aware of that circumstance, or conveys or assigns it without valuable consideration, even to a person who has no notice, such person will be treated as a trustee for the cestui que trust. And if a person,

(*a*) Story's Eq. Jur. § 1211; 1 Spence's Eq. Jur. 512; 2 Spence's Eq. Jur. 208, 299, 300; 1 Cruise T. 12, c. 1, § 61. As to purchases by trustees, see *supra*, par. 2364.

(*b*) See Story's Eq. Jur. § 1158, 1560; 2 Spence's Eq. Jur. 203.

(*c*) *Cooper v. Wormald*, 27 Beav. 266.

(*d*) See Story's Eq. Jur. § 1264, and note; 2 Spence's Eq. Jur. 40, 195, 196; 1 Cruise T. 12, c. 4, § 10, 12, 13.

(*e*) *Dance v. Goldingham*, L. R. 8 Ch. Ap. 902.

though without any notice of a trust, and for valuable consideration, takes from a trustee a mere equitable estate, interest, or charge, when for his own safety he ought to have required a legal estate, interest, or charge, he cannot set it up against the cestui que trust, where the trustee wrongfully created it (*a*). And an executor is deemed a trustee of the assets of his testator (*b*). **3111.**

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If a cestui que trust is in possession, that is constructive notice of the trust to a purchaser from the trustee (*c*). **3112.**

A trustee may bind the estate by a bonâ fide mortgage or other specific lien, without notice of the trust. But the trust property will not be bound by any judgment or other claim of creditors against the trustees (*d*). **3113.**

By the stat. 23 & 24 Vict. c. 145, after reciting that "it is expedient that certain powers and provisions which it is now usual to insert in settlements, mortgages, wills, and other instruments should be made incident to the estates of the persons interested, so as to dispense with the necessity of inserting the same in terms in every such instrument": it is enacted that "in all cases where by any will, deed, or other instrument of settlement it is expressly declared that trustees or other persons therein named or indicated shall have a power of sale, either generally, or in any particular event, over any hereditaments named or referred to in or from time to time subject to the uses or trusts of such will, deed, or other instrument, it shall be lawful for such trustees or other persons, whether such hereditaments be vested in them or not, to exercise such power of sale by selling such hereditaments, either together or in lots, and either by auction or private contract, and either at one time or at several times, and (in case the power shall expressly authorize an exchange) to exchange

Powers  
given by the  
stat. 23 & 24  
Vict. c. 145.

Trustees  
empowered  
to sell may  
sell in lots,  
and either  
by auction  
or private  
contract.

Power to  
exchange.

(*a*) *Shropshire Union Railways, &c., Co. v. The Queen*, L. R. 7 H. L. 496. Spence's Eq. Jur. 512; 2 Id. 40, 195, 298; 1 Cruise T. 12, c. 4, § 13.

(*c*) 2 Pres. Shep. T. 507, n. (8).

(*b*) Story's Eq. Jur. § 1257; 1

(*d*) Story's Eq. Jur. § 977.

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any hereditaments which for the time being shall be subject to the uses or trusts aforesaid for any other hereditaments in England or Wales or in Ireland (as the case may be), and upon such exchange to give or receive any money for equality of exchange" (s. 1). 3114.

Sale may be made under special conditions, and trustees may buy in, rescind, or vary contracts, and re-sell.

And "it shall be lawful for the persons making any such sale or exchange to insert any such special or other stipulations, either as to title or evidence of title, or otherwise, in any conditions of sale, or contract for sale or exchange, as they shall think fit, and also to buy in the hereditaments or any part thereof at any sale by auction, and to rescind or vary any contract for sale or exchange, and to resell the hereditaments which shall be so bought in, or as to which the contract shall be so rescinded, without being responsible for any loss which may be occasioned thereby, and no purchaser under any such sale shall be bound to inquire whether the persons making the same may or may not have in contemplation any particular re-investment of the purchase money in the purchase of any other hereditaments or otherwise" (s. 2) (a). 3115.

Protection to purchaser.

Trustees exercising power of sale, etc., empowered to convey.

"For the purpose of completing any such sale or exchange as aforesaid, the persons empowered to sell or exchange as aforesaid shall have full power to convey or otherwise dispose of the hereditaments in question, either by way of revocation and appointment of the use or otherwise, as may be necessary" (s. 3). 3116.

Moneys arising from sales, etc., to be laid out in other lands;

"The money so received upon any such sale or for equality of exchange as aforesaid shall be laid out in the manner indicated in that behalf in the will, deed, or instrument containing the power of sale or exchange, or if no such indication be therein contained as to all or any part of such money, then the same shall with all convenient speed be laid out in the purchase of other hereditaments in fee simple in possession to be situate in

(a) As to depreciatory conditions by trustees, see *supra*, par. 1862.

England or Wales or in Ireland (as the case may be), or of lands of a leasehold or copyhold or customary tenure, which, in the opinion of the persons making the purchase, are convenient to be held therewith or with any other hereditaments for the time being, subject to the subsisting uses or trusts of the same will, deed, or other instrument of settlement in which the power of sale or exchange was contained; and all such hereditaments so to be purchased or taken in exchange as aforesaid as shall be freeholds of inheritance shall be settled and assured to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, and declarations, to which the hereditaments sold or given in exchange were or would have been subject, or as near thereto as the deaths of parties and other intervening accidents will admit of, but not so as to increase or multiply charges; and all such hereditaments so to be purchased or taken in exchange as aforesaid as shall be of leasehold or copyhold or customary tenure shall be settled and assured upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisoes, and declarations, as shall, as nearly as may be, correspond with and be similar to the aforesaid uses, trusts, intents, and purposes, powers, provisoes, and declarations, but not so as to increase or multiply charges, and so that if any of the hereditaments so to be purchased shall be held by lease for years the same shall not vest absolutely in any tenant in tail by purchase who shall not attain the age of twenty-one years; and any such purchase as aforesaid may be made subject to any special conditions as to title or otherwise: Provided that no leasehold tenement shall be purchased under the powers hereinbefore contained which is held for a less period than sixty years" (s. 4). 3117.

"Provided nevertheless, That it shall be lawful for the persons exercising any such power as aforesaid, if they

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or in pay-  
ment of in-  
cumbrances

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shall think fit, to apply any money to be received upon any sale or for equality of exchange as aforesaid, or any part thereof, in lieu of purchasing land therewith, in or towards paying off or discharging any mortgage or other charge or incumbrance which shall or may affect all or any of the hereditaments which shall then be subject to the same uses or trusts as those to which the hereditaments sold or given in exchange were or was subject" (s. 5). 3118.

Money arising from sales, etc., not to be laid out, nor lands exchanged, elsewhere than in the country in which land sold or exchanged is situated.

"No money arising from any such sale or exchange of lands or hereditaments in England or Wales shall be laid out in the purchase of lands or hereditaments situate elsewhere than in England or Wales, and no lands situate in England or Wales shall, under any such power as aforesaid, be exchanged for any lands or hereditaments situate elsewhere than in England or Wales; and no money arising from any such sale or exchange of lands in Ireland shall be laid out in the purchase of lands or hereditaments situate elsewhere than in Ireland, and no lands or hereditaments situate in Ireland shall, under any such power as aforesaid, be exchanged for any lands or hereditaments situate elsewhere than in Ireland" (s. 6). 3119.

Until purchase of lands, etc., money to be invested at interest.

"Until the money to be received upon any sale or for equality of exchange as aforesaid shall be disposed of in the manner herein mentioned, the same shall be invested at interest for the benefit of the same parties who would be entitled to the hereditaments to be purchased therewith as aforesaid, and the rents and profits thereof, in case such purchase and settlement as aforesaid were then actually made" (s. 7). 3120.

Trustees of renewable leaseholds may renew.

"It shall be lawful for any trustees of any leaseholds for lives or years which are renewable from time to time, either under any covenant or contract or by custom or usual practice, if they shall in their discretion think fit, and it shall be the duty of such trustees, if thereunto required by any person having any beneficial interest,



present or future or contingent, in such leaseholds, to use their best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose it shall be lawful for any such trustees from time to time to make or concur in making such surrender of the lease for the time being subsisting, and to do all such other acts as shall be requisite in that behalf; but this section is not to apply to any case where by the terms of the settlement or will the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew the lease or to contribute to the expense of renewing the same" (s. 8). **3121.**

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"In case any money shall be required for the purpose of paying for equality of exchange as aforesaid, or for renewal of any lease as aforesaid, it shall be lawful for the persons effecting such exchange or renewal to pay the same out of any money which may then be in their hands in trust for the persons beneficially interested in the lands to be taken in exchange, or comprised in the renewed lease, whether arising by any of the ways and means hereinbefore mentioned or otherwise, and notwithstanding the provisions for the application of money arising from sales or exchanges hereinbefore contained; and if they shall not have in their hands as aforesaid sufficient money for the purposes aforesaid, it shall be lawful for such persons to raise the money required by mortgage of the hereditaments to be received in exchange or contained in the renewed lease (as the case may be), or of any other hereditaments for the time being subject to the subsisting uses or trusts to which the hereditaments taken in exchange or comprised in the renewed lease (as the case may be) shall be subject; and for the purpose of effecting such mortgage such persons shall have the same powers of conveying or otherwise assuring as are herein contained

Money for  
equality of  
exchange  
and for  
renewal of  
leases, how  
provided.

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with reference to a conveyance on sale ; and no mortgagee advancing money upon such mortgage purporting to be made under this power shall be bound to see that such money is wanted, or that no more is raised than is wanted for the purposes aforesaid ” (s. 9). **3122.**

Consent to  
sale, ex-  
change, or  
purchase.

“No such sale or exchange as aforesaid, and no purchase of hereditaments out of money received on any such sale or exchange as aforesaid, shall be made without the consent of the person appointed to consent by the will, deed, or other instrument, or if no such person be appointed, then of the person entitled in possession to the receipt of the rents and profits of such hereditaments, if there be such a person under no disability; but this clause shall not be taken to require the consent of any person where it appears from the will, deed, or other instrument to have been intended that such sale, exchange, or purchase should be made by the person or persons making the same without the consent of any other person” (s. 10). **3123.**

Who deemed  
to be en-  
titled to  
possession  
or income.

“For the purposes of this Act, a person shall be deemed to be entitled to the possession or to the receipt of the rents and income of land or personal property, although his estate may be charged or incumbered, either by himself or by any former owner, or otherwise howsoever to any extent; but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and income as aforesaid, unless they shall concur therein ” (s. 31). **3124.**

Powers, etc.,  
hereby  
given may  
be negatived  
by express  
declaration,  
and shall be  
subject to  
express  
provisions.

“None of the powers or incidents hereby conferred or annexed to particular offices, estates, or circumstances shall take effect or be exercisable if it is declared in the deed, will, or other instrument creating such offices, estates, or circumstances that they shall not take effect; and where there is no such declaration, then if any variations or limita-

tions of any of the powers or incidents hereby conferred or annexed are contained in such deed, will, or other instrument, such powers or incidents shall be exercisable or shall take effect only subject to such variations or limitations" (s. 32). **3125.**

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"Nothing in this Act contained shall be deemed to empower any trustees or other persons to deal with or affect the estates or rights of any persons soever, except to the extent to which they might have dealt with or affected the estates or rights of such persons if the deed, will, or other instrument under which such trustees or other persons are empowered to act had contained express powers for such trustees or other persons so to deal with or affect such estates or rights" (s. 33). **3126.**

Provisions  
in the Act  
to operate as  
if inserted  
in the in-  
struments

"The provisions contained in this Act shall, except as hereinbefore otherwise provided, extend only to persons entitled or acting under a deed, will, codicil, or other instrument executed after the passing of this Act, or under a will or codicil confirmed or revived by a codicil executed after that date," i.e., 28th August, 1860 (s. 34). **3127.**

Commence-  
ment of Act

[The preceding sections of stat. 23 & 24 Vict. c. 145, are now repealed by stat. 45 & 46 Vict. c. 38, s. 64 (Appendix); but such repeal does not affect any right accrued, or obligation incurred, or the validity, or operation, of any instrument made, or of anything done, or of any order made, or any action, proceeding, or thing pending, or uncompleted before the 1st of January, 1883. The latter Act confers on the tenant for life powers similar to those given to trustees by the repealed sections (a), but he is required to give previous notice to the trustees of the settlement (b). It also contains provisions respecting the application of money in Court under the Lands Clauses Acts and other Acts, including stat. 40 & 41 Vict. c. 18

Stat. 45 & 46  
Vict. c. 38.  
The Settled  
Land Act,  
1882.

(a) See supra, par. 448 c et seq., and par. 1963 a; also the first and the third and following sections of

stat. 45 & 46 Vict. c. 38, in Appendix.

(b) S. 45 also; *In re Ray's Settled Estates*, L. R. 25 Ch. D. 464.

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(Appendix), and in the hands of trustees under the provisions of a settlement (*a*). And money arising from leases and sales by the Court under the last-mentioned statute may also be applied in the manner provided by that Act.] 3127a.

As to receipts of trustees being effectual discharges.

By the stat. 7 & 8 Vict. c. 76, s. 10, it was enacted "that the bonâ fide payment to and the receipt of any person to whom any money shall be payable upon any express or implied trust or for any limited purpose, or of the survivors or survivor of two or more mortgagees or holders, or the executors or administrators of such survivor, or their or his assigns, shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating the trust or security." This enactment, which only took effect on the first day of January, 1845, was repealed by the stat. 8 & 9 Vict. c. 106, s. 1, as from the first day of October in the same year (*b*). But by the stat. 22 & 23 Vict. c. 35, s. 23, "the bonâ fide payment to and the receipt of any person to whom any purchase or mortgage money shall be payable upon any express or implied trust shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating the trust or security." And by the stat. 23 & 24 Vict. c. 145, s. 29 (*c*), "the receipts in writing of any trustees or trustee for any money payable to them or him by reason or in the exercise of any trusts or powers reposed or vested in them or him shall be sufficient discharges for the money therein expressed to be received, and shall effectually exonerate the persons paying such money from seeing to

(*a*) See ss. 32—4 of stat. 45 & 46 Vict. c. 38, in Appendix.

(*c*) But see ss. 32—4, *supra*, par. 3125—7, 3127 a.

(*b*) See *supra*, par. 1673, 1674.

the application thereof, or from being answerable for any loss or misapplication thereof." [But this section is repealed by stat. 44 & 45 Vict. c. 41 (Appendix), which enacts by s. 36, that "the receipt in writing of any trustees or trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to them or him under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application, or being answerable for any loss or misapplication thereof." And the more recent stat. 45 & 46 Vict. c. 38, s. 40 (Appendix), also contains a similar provision.] **3128.**

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When all the duties of a trustee are at an end, and this is clearly shown to him, and he has no notice of any disposition or incumbrance made by the cestui que trust, he must, on demand, convey the legal estate to his cestui que trust, at the peril of paying the costs of any suit occasioned by his refusal. In cases of real doubt or difficulty, a trustee, before he parts with his estate, is fully justified in requiring an indemnity from his cestui que trust, or in seeking the direction and indemnity of the Court (*a*). Where the beneficial occupation of a trust estate by the person entitled to it has given reason to suppose that there was a conveyance of the legal estate to the person who was equitably entitled to it, a jury may be directed to presume such a conveyance (*b*). **3129.**

Conveyance  
of legal  
estate to  
cestui que  
trust.

Where there is a devise, bequest, conveyance, or assignment to two trustees, whether nominatim or not, and one assents and the other disclaims, the property passes to the assenting trustee. And if power is given to them, whether nominatim or not, to give receipts, the receipt of the assenting trustee alone will be sufficient (*c*). **3130.**

Renuncia-  
tion of  
trust.

(*a*) 2 Spence's Eq. Jur. 48.

(*b*) 1 Cruise T. 12, c. 2, § 39.

(*c*) 2 Spence's Eq. Jur. 351;

Lewin on Trusts, 3rd ed. 532—3;

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A disclaiming trustee should not convey the estate to his co-trustee; for, according to *Crem v. Dicken* (a), if a trustee refusing to act, reconveys his interest to his co-trustee, he thereby accepts the trust, though he conveys away the estate (b). But according to *Nielson v. Wordsworth* (c), a release, with intent to operate as a disclaimer, will be held to amount to a disclaimer in equity (d). **3131.**

Trustee Act,  
1850.

By the stat. 13 & 14 Vict. c. 60, s. 1, the stat. 11 Geo. 4 & 1 Will. 4, c. 60, as to trustees and mortgagees, the stat. 4 & 5 Will. 4, c. 23, as to escheat and forfeiture of trust property, and the stat. 1 & 2 Vict. c. 69, as to heirs and devisees of mortgagees, are repealed, but without reviving the Acts repealed thereby. **3132.**

By the same statute (13 & 14 Vict. c. 60), an order may be made, vesting in any other persons estates vested in trustees or mortgagees who are of unsound mind (s. 3), or are infants (s. 7), or in trustees who are out of the jurisdiction or cannot be found (ss. 9, 10). **3133.**

An order may also be made releasing or disposing of to any other persons, contingent rights in hereditaments to which such trustees or mortgagees are entitled (ss. 4, 8, 11, 12). **3134.**

A similar vesting order may be made as to estates in trustees, where it is uncertain which was the survivor (s. 13); or where it is uncertain whether the last trustee is living or dead (s. 14); or where a trustee dies intestate without an heir, or it is not known who is his heir or devisee (s. 15). **3135.**

A similar vesting order may be made in the case of contingent rights of unborn trustees (s. 16). **3136.**

An order may also be made vesting in any other persons

Hill on Trustees, 484; Sugd. V. & P. 13th ed. 547; *Adams v. Taunton*, 5 Mad. 435.

(a) 4 Ves. 97.

(b) 3 Jarm. & Byth. by Sweet,

698; 1 Cruise T. 12, c. 4, § 59.

(c) 2 Swanst. 365.

(d) See 3 Jarm. & Byth. by Sweet, 700—702.

the right to transfer any stock, or receive the income thereof, or to sue for a chose in action on any interest in respect thereof, in the case of trustees or mortgagees or personal representatives of unsound mind (ss. 5, 6, 20), or trustees or personal representatives out of the jurisdiction or not to be found, or concerning whom it is not known whether they are living or dead (ss. 22, 25, 20), or in the case of trustees or personal representatives who neglect or refuse to transfer or receive the income, or trustees who neglect or refuse to sue for any chose in action (see ss. 23, 24, 25, as amended by ss. 4 and 5 of the stat. 15 & 16 Vict. c. 55). Sections 21, 26, define the effect of such an order as last mentioned. **3137.**

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Power is given to appoint a person to convey, assign, release, or dispose of, instead of making a vesting or releasing order (s. 20). **3138.**

The same powers are given to the Courts in Lancaster and Durham, as regards lands within their jurisdiction (s. 21). **3139.**

Section 28 defines the effect of an order vesting copyhold or customary lands, or appointing a person to convey them. **3140.**

Section 29 relates to the case of lands ordered to be sold for payment of debts; and section 30 enables the Court to declare certain persons to be trustees. **3141.**

Sections 32—35 confer a general power on the Court to appoint new trustees, and vest in them the hereditaments, or the right to call for a transfer, or to receive dividends, or to sue. **3142.**

By the stat. 15 & 16 Vict. c. 55, intituled "An Act to extend the Provisions of the Trustee Act, 1850," the provisions of the 29th section of that Act are applied to decrees for sales generally, and are otherwise extended. **3143.**

Act to extend Trustee Act, 1850.

By s. 2 (which repeals the 17th and 18th sections of the Trustee Act, 1850), power is given to make an order, vest-

ing in another person an estate, or releasing a contingent right, on refusal or neglect of a trustee to convey or release. **3144.**

By s. 3, power is given to make an order vesting in another person the right to transfer or receive the income of stock in the name of an infant trustee. **3145.**

By s. 8, power is given to appoint new trustees in the place of persons convicted of felony. **3146.**

By s. 9, "in all cases where it shall be expedient to appoint a new trustee, and it shall be found inexpedient, difficult, or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court to make an order appointing a new trustee or new trustees, whether there be any existing trustee or not at the time of making such order." **3147.**

[Where a testator became a lunatic and the trustees appointed by his will predeceased him, the Court, acting under this section, appointed new trustees of the will, to receive the proceeds of the sale of the real estate of the lunatic, which had been paid into Court (a).] **3147a.**

The Trustee Act, 1850, contains an interpretation clause (s. 2); and by s. 12 of the subsequent Act, that Act is to be construed as part of the former Act. **3148.**

By s. 13, vesting orders under these Acts are to be chargeable with the same duty as deeds. **3149.**

By the statute 37 & 38 Vict. c. 78, s. 5, "upon the death of a bare trustee of any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, such hereditament shall vest like a chattel real in the legal personal representative from time to time of such trustee." **3150.**

By the statute 38 & 39 Vict. c. 87, s. 48, it is enacted that "section five of the Vendor and Purchaser Act, 1874, shall be repealed on and after the commencement of this

(a) *In re Orde*, L. R. 24 Ch. D. (Ap.) 271,

Bare legal estate in fee simple to vest in executor or administrator.



Act, except as to anything duly done thereunder before the commencement of this Act ; and, instead thereof, be it enacted, that upon the death of a bare trustee intestate as to any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, such hereditament shall vest like a chattel real in the legal personal representative from time to time of such trustee ; but the enactment by this section substituted for the aforesaid section of the Vendor and Purchaser Act, 1874, shall not apply to lands registered under this Act.” **3151.**

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[But as regards cases of death after the 31st day of December, 1881, this enactment is repealed by stat. 44 & 45 Vict. c. 41, s. 30 (Appendix), which enacts “section four of the Vendor and Purchaser Act, 1874, and section forty-eight of the Land Transfer Act, 1875, are hereby repealed,” and in its place a more extensive provision is substituted (a).] **3152.**

In selecting a person for the office of trustee, the Court will have regard to the wishes of the author of the trust, expressed in, or clearly to be collected from the instrument creating it. Again, the Court will not appoint a person to be a trustee, with a view to the interest of some of the persons interested under the trust, in opposition to the interests of others. For it is the essence of the duty of every trustee to hold an even hand between the parties interested under the trust. And thirdly, the Court will have regard to the question, whether the appointment will promote or impede the execution of the trust (b). **3153.**

Principles of  
the Court  
in selecting  
new  
trustees.

[The Court will not admit the word “gentleman” to be a sufficient description of a person, who makes an affidavit, as to the fitness of a proposed new trustee (c).] **3153a.**

(a) See *supra*, par. 3089 a, and as to Ireland see section 23 of stat. 44 & 45 Vict. c. 41, in Appendix.

(b) *In re Tempest*, L. R. 1 Ch.

Ap. 484.

(c) *In re Orde*, L. R. 24 Ch. D. (Ap.) 271.

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The general rule is that the Court will not appoint a tenant for life. But those to whom a power of appointing new trustees is given by the deed or will, and à fortiori the Court itself, may appoint a tenant for life, unless there is any indication in the instrument against such an appointment (*a*). 8154.

Power of  
appointing  
new  
trustees.

[The stat. 23 & 24 Vict. c. 145, which recites that it was made to dispense with the necessity of inserting certain usual provisions in deeds, wills, and other instruments, contained in section 27 various enactments respecting the appointment of new trustees. These enactments are

Stat. 44 & 45  
Vict. c. 41.  
The Con-  
veyancing  
and Law of  
Property  
Act, 1881.

now repealed by stat. 44 & 45 Vict. c. 41 (Appendix), which substitutes the following provisions—viz., by s. 31, “(1) Where a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for this purpose by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing or being unfit, or being incapable, as aforesaid. (2) On an appointment of a new trustee, the number of trustees may be increased. (3) On an appointment of a new trustee, it shall not be obligatory to appoint more than one new trustee, where only one trustee was originally appointed, or to fill up the original number of

(*a*) *Forster v. Abraham*, L. R. 17 Eq. 351.

[trustees, where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust. (4) On an appointment of a new trustee any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done. (5) Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust. (6) The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator; and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section. (7) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained. (8) This section applies to trusts created either before or after the commencement of this Act." This section is not intended to vary the practice of the Court under stat. 23 & 24 Vict. c. 60 (a). 3155.

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Also by s. 32, "(1) Where there are more than two trustees, Retirement of trustee.  
if one of them by deed declares that he is desirous of being discharged from the trust, and if his co-trustees, and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be

(a) *In re Aston*, L. R. 28 Ch. D. (Ap.) 217.

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T. 1, CH. 2.

[deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place. (2) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done. (3) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained. (4) This section applies to trusts created either before or after the commencement of this Act." 3156.

Powers of  
new trustee  
appointed  
by Court.

By s. 33, "(1) Every trustee appointed by the Court of Chancery, or by the Chancery Division of the Court, or by any other Court of competent jurisdiction, shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust. (2) This section applies to appointments made either before or after the commencement of this Act." 3157.

Vesting of  
trust pro-  
perty in new  
or con-  
tinuing  
trustees.

And by s. 34, (1) "Where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right. (2) Where a deed by which a retiring trustee is discharged under this Act contains such a declaration as is in this section mentioned by the retiring and continuing trustees, and by the other

[person, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates. (3) This section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner prescribed by or under Act of Parliament. (4) For purposes of registration of the deed in any registry, the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act. (5) This section applies only to deeds executed after the commencement of this Act.” **3157a.**

An important further provision is made by stat. 45 & 46 Vict. c. 39, s. 6 (Appendix), which enacts, “(1) On an appointment of new trustees, a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part. (2) This section applies to trusts created either before or after the commencement of this Act.” **3157b.**

Stat. 45 & 46  
Vict. c. 39.  
The Con-  
veyancing  
Act, 1882.  
Appoint-  
ment of  
separate sets  
of trustees.

It is also enacted by stat. 45 & 46 Vict. c. 38 (Appendix), s. 38, “(1) If at any time there are no trustees of a settlement within the definition in this Act, or where in any other case it is expedient, for purposes of this Act, that new trustees of a settlement be appointed, the Court may, if it thinks fit, on the application of the tenant for life or of any other person having, under the

Stat. 45 & 46  
Vict. c. 38.  
The Settled  
Land Act,  
1882.  
Appoint-  
ment of  
trustees by  
the Court.

PART IV.  
T. 1, CH. 2

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[settlement, an estate or interest in the settled land, in possession, remainder, or otherwise, or, in the case of an infant, of his testamentary or other guardian, or next friend, appoint fit persons to be trustees under the settlement for purposes of this Act. (2) The persons so appointed, and the survivors and survivor of them, while continuing to be trustees or trustee, and until the appointment of new trustees, the personal representatives or representative for the time being of the last surviving or continuing trustee, shall for purposes of this Act become and be the trustees or trustee of the settlement." 3157c.

Reference of  
differences  
to Court.

And the same statute further enacts by s. 44, that "If at any time a difference arises between a tenant for life and the trustees of the settlement, respecting the exercise of any of the powers of this Act, or respecting any matter relating thereto, the Court may, on the application of either party, give such directions respecting the matter in difference, and respecting the costs of the application, as the Court thinks fit." 3157d.

Appoint-  
ment of a  
trustee  
whom the  
testator has  
excluded.

The appointment of a person as new trustee of a will whom the testator has excluded from the trust by a codicil, after having appointed him by will, is improper, and the Court will cancel the appointment, and declare the conveyance to such person void (a). 3158.

Payment or  
transfer into  
the Court of  
Chancery.

By the stat. 10 & 11 Vict. c. 96, s. 1, intituled "An Act for better securing Trust Funds and for the Relief of Trustees," "all trustees, executors, administrators, or other persons, having in their hands any moneys belonging to any trust whatsoever, or the major part of them, shall be at liberty, on filing an affidavit, shortly describing the instrument creating the trust, according to the best of their knowledge and belief, to pay the same, with the privity of the Accountant-General of the High Court of Chancery, into the Bank of England, to the account of such Accountant-

(a) *Sugden v. Crossland*, 3 Sm. & G. 192.

General in the matter of the particular trust (describing the same by the names of the parties, as accurately as may be, for the purpose of distinguishing it), in trust to attend the orders of the said Court; and all trustees or other persons having any annuities or stocks standing in their names in the books of the Governor and Company of the Bank of England or of the East India Company or South Sea Company, or any Government or parliamentary securities standing in their names or in the names of any deceased persons of whom they shall be personal representatives, upon any trusts whatsoever, or the major part of them, shall be at liberty to transfer or deposit such stocks or securities into or in the name of the said Accountant-General, with his privity, in the matter of the particular trust (describing the same as aforesaid), in trust to attend the orders of the said Court," etc. And by the stat. 12 & 13 Vict. c. 74, it is enacted "that if upon any petition presented to the Lord Chancellor or Master of the Rolls in the matter of the said Act (10 & 11 Vict. c. 96), it shall appear to the judge of the Court of Chancery before whom such petition shall be heard, that any moneys, annuities, stocks, or securities are vested in any persons as trustees, executors, or administrators, or otherwise upon trusts within the meaning of the said recited Act, and that the major part of such persons are desirous of transferring, paying, or delivering the same to the Accountant-General of the High Court of Chancery under the provisions of the said recited Act, but that for any reason the concurrence of the other or others of them cannot be had, it shall be lawful for such judge as aforesaid to order and direct such transfer, payment, or delivery to be made by the major part of such persons without the concurrence of the other or others of them; and where any such moneys or Government or parliamentary securities shall be deposited with any banker, broker, or other depositary, it shall be lawful for such

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T. 1, CH. 2.

judge as aforesaid to make such order for the payment or delivery of such moneys, Government or parliamentary securities, to the major part of such trustees, executors, administrators, or other persons as aforesaid, for the purpose of being paid or delivered to the said Accountant-General as to the said judge shall seem meet." 3159.

Stat. 25 & 26  
Vict. c. 108,  
as to sales,  
exchanges,  
partitions,  
and enfran-  
chisements  
of land  
heretofore  
made,  
reserving or  
excepting  
minerals ;

By the stat. 25 & 26 Vict. c. 108, " no sale, exchange, partition, or enfranchisement at any time heretofore of land by any trustee or other person, expressed or intended to be made in exercise of any trust or power authorizing the sale, exchange, partition, or enfranchisement of land, and not forbidding the reservation of minerals, and which sale, exchange, partition, or enfranchisement shall have been made with an exception or reservation of minerals, and with or without rights or powers for or incidental to the working, getting, and carrying away of such minerals, or otherwise relating thereto, shall be invalid on the ground only that the trust or power did not expressly authorize such exception or reservation, but such sale, exchange, partition, or enfranchisement shall be deemed to have taken effect in the same manner as if the exception or reservation had been authorized by the trust or power ; and no sale, exchange, or partition heretofore made as aforesaid of any minerals separately from the residue of the land subject to the trust or power intended to have been exercised, and either with or without such rights or powers as aforesaid shall be invalid on the ground only that the trust or power did not expressly authorize such sale, exchange, or partition, but such sale, exchange, or partition shall be deemed to have taken effect in the same manner as if such minerals, rights, and powers (if any) had been expressly authorized to be so dealt with separately from the residue of such land ; but this enactment shall not be deemed to confirm any sale, exchange, partition, or enfranchisement already declared by a Court of competent

and as to  
past sales,  
exchanges,  
and parti-  
tions of  
minerals  
apart from  
the land ;



jurisdiction to be invalid, nor to confirm or affect any sale, exchange, partition, or enfranchisement, as to the validity of which any suit or other proceeding is now pending” (s. 1). **3160.**

PART IV.  
T. 1, CH. 2.

“ Every trustee and other person now or hereafter to become authorized to dispose of land by way of sale, exchange, partition, or enfranchisement may, unless forbidden by the instrument creating the trust or power, so dispose of such land with an exception or reservation of any minerals, and with or without rights and powers of or incidental to the working, getting, or carrying away of such minerals, or may (unless forbidden as aforesaid) dispose of by way of sale, exchange, or partition the minerals with or without such rights or powers separately from the residue of the land, and in either case without prejudice to any future exercise of the authority with respect to the excepted minerals, or (as the case may be) the undisposed-of land; but this enactment shall not enable any such disposition as aforesaid, without the previous sanction of the Court of Chancery, to be obtained on petition in a summary way of the trustee or other person authorized as aforesaid, which sanction once obtained shall extend to the enabling from time to time of any disposition within this enactment of any part or parts of the land comprised in the order to be made on such petition, without the necessity of any further or other application to the Court ” (s. 2). **3161.**

and as to  
future trans-  
actions of  
the same  
kind.

[In connection with the preceding paragraphs it may be stated that by virtue of stat. 45 & 46 Vict. c. 38, s. 17 (Appendix), “ (1) A sale, exchange, partition, or mining lease, may be made, either of land, with or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals, and in any such case with or without a grant or reservation of powers of working, way leaves or rights of way, rights of water and drainage, and other powers, easements,

Stat. 45 & 46  
Vict. c. 38.  
The Settled  
Land Act,  
1882.  
Separate  
dealing with  
surface and  
minerals,  
with or  
without way  
leaves, etc.

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rights, and privileges for or incident to or connected with mining purposes, in relation to the settled land, or any part thereof, or any other land. (2) An exchange or partition may be made subject to and in consideration of the reservation of an undivided share in mines or minerals." Also under the previous stat. 40 & 41 Vict. c. 18, s. 19 (Appendix), the Court has power to authorize such separate transactions (a).] 3161a.

(a) *In re Milward's Estate*, L. R. 6 Eq. 248.

## CHAPTER III.

OF MARRIED WOMEN (*a*).

AT the common law, the being or legal existence of the wife, for almost all purposes, is considered as merged in that of the husband (*b*). But Courts of Equity, in many respects, treat husband and wife as distinct persons (*c*). By the stat. 33 & 34 Vict. c. 93, this distinctness of interest is greatly extended. [And by stat. 45 & 46 Vict. c. 75 (Appendix), the legal distinction between married and unmarried women, with respect to property, and the disabilities of married women, are almost entirely abolished.] **3162.**

PART IV.  
T. 1, CH. 3.

How husband and wife are regarded at law and in equity

In treating of this subject, let us consider—

- I. The legal disability of married women.
- II. The power which husband and wife have in equity, of contracting with, and giving, and granting to, each other.
- III. The interest of the husband in the wife's property.
- IV. The wife's pin-money and paraphernalia.
- V. The wife's separate estate.
- VI. The equity of the wife to a settlement or maintenance out of her own property.
- VII. Some points respecting deeds of separation.
- VIII. Some miscellaneous points. **3163.**

(*a*) The reader is referred to the works of Mr. Bright, Mr. Macqueen, and Mr. Bell, for further informa-

tion on this subject.

(*b*) See Story's Eq. Jur. § 1367.

(*c*) Story's Eq. Jur. § 1368.

## SECTION I.

*The Legal Disability of Married Women.*

Pr. IV. T. 1,  
Oh. 8, s. 1.

General rule  
as to real  
estate.

It [was a general] rule that in no other way than with the protection of a private examination to ascertain whether or not the wife deliberately assented to the arrangement, could her real estate be touched or affected; and every act done in her name or on her behalf by her husband, without this protection, was her husband's act, and an act with which, in the eye of the law, she had no concern whatever (a). **3164.**

Stat. 45 & 46  
Vict. c. 75.  
The Married  
Women's  
Property  
Act, 1882.

[This rule still applies to cases not affected by stat. 45 & 46 Vict. c. 75 (Appendix), but the law regulating the status of married women is now altered by the provisions of that Act, which enacts, s. 1 “(1) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property in the same manner as if she were a femme sole, without the intervention of any trustee. (2) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued either in contract or in tort, or otherwise, in all respects as if she were a femme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be payable out of her separate property, and not otherwise.” By virtue of that Act a wife married before the 1st of January, 1883, with respect to property acquired by her on or after that date, and also a wife married on or after

(a) *Nicholl v. Jones*, L. R. 3 Eq. 708

that date as regards her property generally, is capable of acting as if she were a femme sole (*a*).] **3164a.**

PT. IV. T. 1,  
CH. 3, s. 1.

But a married woman might, with her husband, make an effectual assurance by fine or recovery, and, in order to do this, she might join with him in the declaration of uses of such fine or recovery (*b*). And as we have seen, married women are now enabled to dispose of their real property, and of money subject to be invested in the purchase of real property, and of the proceeds to arise from the sale of land, or may release or extinguish powers relating thereto by an assurance, under the stat. 3 & 4 Will. 4, c. 74 (*c*). A married woman may also execute a power or authority, in the absence of words to the contrary, whether such power is given to her before or after marriage, or upon her marriage, and even without the concurrence of her husband (*d*). Again, if an estate is made to a married woman upon condition to convey, she will be bound to perform it; because this does not charge her person, but the land (*e*). And by the custom of London and of several other cities, a married woman may bind herself by a deed enrolled, after being privately examined: and this custom was confirmed in the reign of Hen. 8, by a positive statute (*f*). But with the exceptions presently noticed, all other deeds executed by married women, except a Queen Consort, by which they might be deprived of any right or charged with any duty, were absolutely void at law, and not merely voidable (*g*). They were also void in equity, except in certain cases where they related to or affected her separate estate; and no act of the wife after the death of her husband, except in the case of a lease, would in general operate as

Fines,  
recoveries,  
deeds, and  
performance  
of condi-  
tions by  
married  
women.

(*a*) See ss. 1, 2, 5, 25, etc., of stat. 45 & 46 Vict. c. 75, in Appendix.

(*b*) Burton, § 206; 4 Cruise T. 32, c. 12, § 30, 35.

(*c*) See supra, par 2227; *Franks v. Bollens*, L. R. 3 Ch. Ap. 717.

(*d*) 1 Sugd. Pow. 181—2; Co. Litt. 112 a.

(*e*) 2 Cruise T. 13, c. 2, § 17; Co. Litt. 112 a.

(*f*) 4 Cruise T. 32, c. 2, § 33.

(*g*) 2 Bl. Com. 292—3; 4 Cruise

PT. IV. T. 1,  
CH. 8, s. 1.

a confirmation of them (*a*). But if a woman, after the death of her husband, acknowledges a deed executed by her during her marriage, that may in some cases amount to a re-delivery of it, and so render it valid (*b*). 3165.

Leases to  
married  
women.

By the stat. 1 Will. 4, c. 65, s. 12, where a femme covert is entitled to any lease, she, or any person appointed by the order of a Court of Equity in her place, may by such an order be enabled to surrender such lease, and take a new one. By s. 14, expenses attending renewals are to be charged on the estate. And by s. 15, the new leases are to be to the same uses. 3166.

Leases by  
married  
women.

By ss. 16, 20, where a femme covert might in pursuance of any covenant or agreement, if not under disability, be compelled to renew any lease, such femme covert, by the direction of the Court, may accept a surrender of such lease, and execute a new one. 3167.

And, we have seen, by the stat. 19 & 20 Vict. c. 120, additional leasing powers are given in the case of married women (*c*). [That Act is repealed by stat. 40 & 41 Vict. c. 18 (Appendix), which contains provisions for facilitating leases and sales of settled estates by married women.

Stat. 40 & 41  
Vict. c. 18.  
The Settled  
Estates Act,  
1877.

Stat. 45 & 46  
Vict. c. 38,  
s. 61.  
The Settled  
Land Act,  
1882.

And the more recent stat. 45 & 46 Vict. c. 38, s. 61 (Appendix), enacts, “(2) Where a married woman, who, if she had not been a married woman, would have been a tenant for life or would have had the powers of a tenant for life, under the foregoing provisions of this Act, is entitled for her separate use, or is entitled under any statute passed or to be passed for her separate property as a femme sole, then she, without her husband, shall have the powers of a tenant for life under this Act. (3) Where she is entitled otherwise than as aforesaid, then she and her husband together shall have the powers of a tenant for life under

T. 32, c. 2, § 29 ; Burton, § 206 ;  
Watk. Conv. 3rd ed. by Prest. 250,  
251.

(*a*) 4 Cruise T. 32, c. 2, § 29.

(*b*) 4 Cruise T. 32, c. 2, § 31.

(*c*) See *supra*, par. 1905.

this Act. (4) The provisions of this Act referring to a tenant for life and a settlement and settled land shall extend to the married woman without her husband, or to her and her husband together, as the case may require, and to the instrument under which her estate or interest arises; and to the land therein comprised. (5) The married woman may execute, make, and do all deeds, instruments, and things necessary or proper for giving effect to the provisions of this section. (6) A restraint on anticipation in the settlement shall not prevent the exercise by her of any power under this Act.”] **3168.**

Pr. IV. T. 1,  
Ch. 3, s. 1.

By the stat. 8 & 9 Vict. c. 106, s. 7, it is enacted, “that after the 1st day of October, 1845, an estate or interest in any tenements or hereditaments in England, of any tenure, may be disclaimed by a married woman by deed; and that every such disclaimer shall be made conformably to the provisions of the Act for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance.” **3169.**

Capacity of  
married  
women to  
disclaim  
estates or  
interests by  
deed.

A woman [married before the 1st of January, 1883,] is incapable of making a testament of chattels, without the licence of her husband; except of property to which she is entitled in autre droit, as executrix, or of property settled to her separate estate use (a) [or which she is entitled to have and to hold and dispose of as her separate property,] or of property over which she has a power of appointment by will. And the husband’s licence or assent must be given to the particular will, and can only give validity even to that, if he knows its contents, and in the event of his being the survivor. And he may revoke such assent at any time during his wife’s life, or after her death before probate. After her husband’s death, however she may recognise her will made during cover-

Power to  
make a will.

(a) See *infra*, par. 3209 et seq.; 778; 7 H. L. 580.  
*Noble v. Willcock*, L. R. 8 Ch. Ap.

PT. IV. T. 1,  
CH. 3, s. 1.

ture by re-executing it, and thereby cause it to operate as a new will. If a married woman, with her husband's assent, makes a will of personalty, it will not pass property bequeathed to her by her husband's will, unless after his death she re-executes it (*a*). **3170.**

The wife of a convicted felon, however, is a femme sole, as regards the power of disposing by will, at least of personal property acquired after her husband's conviction (*b*). **3171.**

Married women were expressly disabled by the old statute of wills from devising their lands. And by s. 8 of the stat. 1 Vict. c. 26, it is enacted that "no will made by a married woman shall be valid, except such a will as might have been made by a married woman before the passing of this Act." But married women are frequently enabled to dispose of lands by wills operating as appointments under powers contained in conveyances to uses (*c*). And the meaning of the 8th section is simply this, that the legal testamentary status of a married woman as such shall remain the same, so that it does not exclude her will from the 24th or the 27th section (*d*). **3172.**

[And now by virtue of the provisions of stat. 45 & 46 Vict. c. 75 (Appendix), a wife married before the 1st of January, 1883, as regards her property acquired on or after that date, and also a wife married on or after that date with respect to her property generally, is empowered to make a will as if she were a femme sole (*e*).] **3172a.**

Surrender of  
copyhold.

A surrender may be made by husband and wife of the wife's copyhold land, without any special custom; she being first examined as to her consent by the steward:

(*a*) Wms. Exors. 4th ed. 45—52; 2 Bl. Com. 498; 1 Jarm. Wills, 2nd ed. 130; *Ex parte Fane*, 16 Sim. 406; *Noble v. Willock*, L. R. 8 Ch. Ap. 778; 7 H. L. 580.

(*b*) *In the goods of Coward*, 4

Swa & Tris. 46.

(*c*) 6 Cruise T. 38, c. 2, § 7.

(*d*) *Thomas v. Jones*, 1 D. J. & S. 63.

(*e*) See ss. 1, 2, 5, & 25 of stat. 45 & 46 Vict. c. 75, in Appendix.



but a custom for the wife to surrender alone cannot be supported (*a*). **3173.**

Pt. IV. T. 1,  
Ch. 3, s. 1.

By the stat. 37 & 38 Vict. c. 78, s. 6, "when any freehold or copyhold hereditament shall be vested in a married woman as a bare trustee, she may convey or surrender the same as if she were a femme sole." **3174.**

Married woman who is a bare trustee may convey, etc.

A power to a married woman to appoint by deed or will, notwithstanding her coverture, and as if she were sole, does not restrict her to an execution during coverture (*b*). **3175.**

Power not confined to coverture.

Married women are capable of purchasing; but [if their marriages took place before the 1st of January, 1883,] their husbands may disagree to their purchases, unless made with their separate property, and thereby divest the whole estate, and maintain an action for the purchase money. If a husband neither agrees nor disagrees to a purchase by his wife [married before that date,] it is effectual during the coverture. But after his death she may waive a purchase by herself, without giving any reason for so doing, even though her husband may have agreed to it. And if after her husband's death she does not agree to it, her heirs may waive it (*c*). If she has separate property, she may contract, as if she were a femme sole, for the purchase of an estate, and her separate property will be bound by the contract, although she do not refer to it. **3176.**

Purchases by married women.

And she may purchase lands pursuant to an authority given her by her husband, and he cannot avoid it afterwards (*d*). **3177.**

And where a woman [married before the 1st of January, 1883,] contracts and pays for real estate, without the knowledge of her husband, but for his benefit, such a

(*a*) Burton, § 1275.

293; 1 Pres. Shep. T. 70; 2 Pres.

(*b*) 1 Sugd. Pow. 183, 333.

Shep. T. 235; Co. Litt. 3 a.

(*c*) Sugd. Concise View, 541; 4 Cruise T. 32, c. 26, § 7; 2 Bl. Com.

(*d*) Sugd. Concise View, 148, 541.

PT. IV. T. 1, purchase is binding when ratified by the husband (a).  
CH. 3, s. 1. **3178.**

Agreement  
for sale.

An agreement by a [wife married before that date] for the sale of her estate [acquired before that date] cannot be enforced, either at law or in equity, unless the estate is settled to her separate use (b). **3179.**

Exchange of  
the wife's  
land.

[In cases not within the stat. 45 & 46 Vict. c. 75 (Appendix), where] an exchange of the wife's land is made by the husband or husband and wife, the wife after the husband's death, or the heir of the wife after her death, and no other person, may avoid it (c). If the husband and wife exchange the lands of the wife, and she, after her husband's death, agrees to it, and enters into the lands taken in exchange, the exchange is hereby made good against her and her heirs. But if the husband alone makes an exchange of his wife's land, and she after his death agrees to this, and enters into the land, it seems this will not make the exchange good; because her entry into the lands received in exchange is without any title, and the grant by the husband alone was not effectual against her (d). **3180.**

Constitut-  
ing an  
attorney.

If a [wife married before the 1st of January, 1883,] makes a feoffment and letter of attorney to make livery, and the attorney does so, this livery is void; because she cannot make a valid deed, and therefore cannot have an attorney by force of the letter of attorney (e). And a woman [could not] even constitute an attorney to do an act relating to her estate, though it be such as she herself might lawfully do, unless she particularly reserved a power for that purpose before her marriage (f). An exception is created by the stat. 11 Geo. 4 & 1 Will. 4, c. 65, s. 11, whereby it is enacted that a married woman,

(a) *Millard v. Harvey*, 34 Beav. 237.

(b) *Sugd. Concise View*, 147.

(c) 2 Pres. Shep. T. 299.

(d) 2 Pres. Shep. T. 299, 300.

(e) 1 Pres. Shep. T. 217.

(f) 3 Jarm. & Byth. by Sweet, 29.

after being examined, or any other person may appoint an attorney to surrender copyholds and do other acts, for the purpose of a common recovery being suffered of such copyholds. [And with respect to deeds executed after the 31st of December, 1882, it is provided by stat. 44 & 45 Vict. c. 41, s. 40 (Appendix), that "a married woman, whether an infant or not, shall by virtue of this Act have power, as if she were unmarried and of full age, by deed, to appoint an attorney on her behalf, for the purpose of executing any deed, or doing any other act which she might herself execute or do; and the provisions of this Act relating to instruments creating powers of attorney shall apply thereto."] **3181.**

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Ch. 8, s. 1.

When bequests are made to the separate use of married women, they alone can give a good discharge for them, because their husbands have no interest in the funds (*a*). [Previously to the stat. 45 & 46 Vict. c. 75 (Appendix), the gift of an immediate absolute legacy of an amount exceeding two hundred pounds to a married woman, operated in effect as a legacy to the husband, who was entitled to receive it, subject indeed to the right of the executors to insist on a settlement in favour of the wife, which, however, was rarely done, unless called for by the embarrassed circumstances or bad conduct of the husband (*b*). So that, unless the wife acted as her husband's agent with due authority, and the legacy was paid to her in that character, payment of it to her alone was void against the husband, and he might recover it against the executors (*c*). But such a gift after the 31st of December, 1882, belongs to the wife as a femme sole (*d*).] **3182.**

Payment of  
legacies  
given to  
married  
women.

A married woman cannot forfeit her copyhold by any act of her own, because she is not sui juris, sed sub

Forfeiture of  
a copyhold.

(*a*) 1 Rep. Leg. by White, 887.

(*b*) 9 Jarm. & Byth. by Sweet,  
828; 1 Rep. Leg. by White, 887.

(*c*) 1 Rep. Leg. by White, 887.

(*d*) See ss. 1, 2, 5, and 25 of stat.  
45 & 46 Vict. c. 75, in Appendix.

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CH. 8, s. 1.

potestate viri. But she may incur a forfeiture by an act done by her husband (*a*). [Now, however, by virtue of the provisions of stat. 45 & 46 Vict. c. 75 (Appendix), a wife married on or after the 1st of January, 1883, as to her property generally; and also a wife married before that date as to her property acquired on or after that date, are each in the position of a femme sole (*b*).] **3183.**

Election.

A married woman can elect so as to affect her interest in real property, without a deed acknowledged under the stat. 3 & 4 Will. 4, c. 74. And where she has so elected, the Court, that she may not avail herself of fraud, can order a conveyance accordingly (*c*). **3184.**

Assignment  
or mortgage  
of chose in  
action.

An assignment or mortgage by a husband and wife [married before the 1st of January, 1883, of the wife's] chose in action will not defeat her right by survivorship, unless the husband, or the assignee, or mortgagee do some act amounting to a reduction of the property into possession (*d*). **3185.**

Married  
woman can  
be a trustee,  
executrix, or  
administratrix.

[A married woman is now competent to accept and act in the office of a trustee, or executrix, or administratrix; and it is no longer necessary that her husband should consent, or join in the administration bond (*e*).] **3185a.**

Stat. 20 & 21  
Vict. c. 85.

Order for  
protection  
of property  
of wife who  
is deserted.

By the stat. 20 & 21 Vict. c. 85, it is enacted as follows:—1. "A wife deserted by her husband may at any time after such desertion, if resident within the metropolitan district, apply to a police magistrate, or, if resident in the country, to justices in petty sessions, or in either case to the Court, for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of, after such desertion, against her husband or his creditors, or any

(*a*) 1 Cruise T. 10, c. 5, § 42.

Ap. 220.

(*b*) See ss. 1, 2, 5 and 25 of stat. 45 & 46 Vict. c. 75, in Appendix.

(*e*) See stat. 45 & 46 Vict. c. 75, ss. 1, 5, 18, and 24, in Appendix. *In the goods of Ayres*, L. R. 8 Prob. D. 168.

(*c*) *Barrow v. Barrow*, 4 K. & J. 409.

(*d*) *Prole v. Soady* L. R. 3 Ch.

person claiming under him; and such magistrate, or justices, or Court, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him, and such earnings and property shall belong to the wife as if she were a femme sole: provided always, that every such order, if made by a police magistrate or justices at petty sessions, shall, within ten days after the making thereof, be entered with the registrar of the County Court within whose jurisdiction the wife is resident; and that it shall be lawful for the husband, and any creditor or other persons claiming under him, to apply to the Court, or to the magistrate or justices by whom such order was made, for the discharge thereof (a): provided also, that if the husband or any creditor or person claiming under the husband shall seize or continue to hold any property of the wife after notice of any such order, he shall be liable at the suit of the wife (which she is hereby empowered to bring), to restore the specific property, and also for a sum equal to double the value of the property so seized or held after such notice as aforesaid: if any such order of protection be made, the wife shall during the continuance thereof be and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation" (s. 21). 2. "In every case of a judicial separation, the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a femme sole with respect to property of every

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CH. 3, s. 1.

Wife  
judicially  
separated to  
be considered  
a femme  
sole as  
regards her  
property,

(a) As to the discharge of such an order, see 27 & 28 Vict. c. 44.

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CH. 3, S. 1.

and as  
regards  
contracts,  
wrongs, and  
suits.

description which she may acquire or which may come to or devolve upon her; and such property may be disposed of by her in all respects as a femme sole, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead; provided, that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate" (s. 25) (a). 3. "In every case of a judicial separation, the wife shall, whilst so separated, be considered as a femme sole for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant; provided that where upon any such judicial separation alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use; provided also, that nothing shall prevent the wife from joining, at any time during such separation, in the exercise of any joint power given to herself and her husband" (s. 26). 3186.

In consequence of these enactments, a wife who has obtained an order for protection is entitled to payment of a fund in Court representing a legacy bequeathed to her (b). 3187.

Provisions  
of stat. 20 &  
21 Vict. ex-  
tended to  
property to  
which the

By the stat. 21 & 22 Vict. c. 108, s. 7, the provisions of the stat. 20 & 21 Vict. c. 85, "respecting the property of a wife who has obtained a decree for judicial separation

(a) See *In re Insole*, L. R. 1 Eq. 470; *Johnson v. Lander*, L. R. 7 Eq. 228; *In re Coward and Adam's*

*Purchase*, L. R. 20 Eq. 179.

(b) *In re Kingsley's Trust*, 26 Beav. 94; *Cooke v. Fuller*, 26 Beav. 99.

or an order for protection, shall be deemed to extend to property to which such wife has become or shall become entitled as executrix, administratrix, or trustee since the sentence of separation or the commencement of the desertion (as the case may be); and the death of the testator or intestate shall be deemed to be the time when such wife became entitled as executrix or administratrix.”

**3188.**

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CH. 3, s. 1.

wife is  
entitled as  
executrix,  
administra-  
trix, or  
trustee.

By s. 8, “in every case in which a wife shall under this Act or under the said Act of the 20 & 21 Vict. c. 85, have obtained an order to protect her earnings or property, or a decree for judicial separation, such order or decree shall, until reversed or discharged, so far as necessary for the protection of any person or corporation who shall deal with the wife, be deemed valid and effectual; and no discharge, variation, or reversal of such order or decree shall prejudice or affect any rights or remedies which any person would have had in case the same had not been so reversed, varied, or discharged in respect of any debts, contracts, or acts of the wife incurred, entered into, or done between the times of the making such order or decree and of the discharge, variation, or reversal thereof. And property of or to which the wife is possessed or entitled for an estate in remainder or reversion at the date of the desertion or decree (as the case may be), shall be deemed to be included in the protection given by the order or decree” (a). **3189.**

Effect of  
order for  
protection  
or decree for  
separation,  
afterwards  
discharged,  
varied, or  
reversed.

Property in  
remainder  
or reversion.

By s. 9, “every order which shall be obtained by a wife, under the said Act of the 20 & 21 Vict. c. 85, or under this Act, for the protection of her earnings or property shall state the time at which the desertion in consequence whereof the order is made commenced; and the order shall, as regards all persons, dealing with such wife in

Order to  
state time of  
desertion.

(a) See *In re Shackle's Trusts*, 7 W. R. 184; 4 Drew. 446. W. R. 280; *In re Raindon's Trust*,

Pr. IV. T. 1,  
CH. 3, s. 1.

reliance thereon, be conclusive as to the time when such desertion commenced." 3190.

Indemnity  
to those who  
act in reli-  
ance on  
orders or  
decrees,  
where after-  
wards dis-  
charged,  
varied, or  
reversed, or  
where sepa-  
ration has  
been discon-  
tinued.

By s. 10, "all persons and corporations who shall, in reliance on any such order or decree as aforesaid, make any payment to, or permit any transfer or act to be made or done by, the wife who has obtained the same, shall notwithstanding such order or decree may then have been discharged, reversed, or varied, or the separation of the wife from her husband may have ceased, or at some time since the making of the order or decree been discontinued, be protected and indemnified in the same way in all respects as if, at the time of such payment, transfer, or other act, such order or decree were valid and still subsisting without variation in full force and effect, and the separation of the wife from her husband had not ceased or been discontinued, unless, at the time of such payment, transfer, or other act, such persons or corporations had notice of the discharge, reversal, or variation of such order or decree, or of the cessation or discontinuance of such separation." 3191.

## SECTION II.

*The Powers which Husband and Wife have of Contracting with, and Giving and Granting to, each other.*

Pr. IV. T. 1,  
CH. 3, s. 2.

I. Contracts  
before  
marriage.

I. At law, contracts made between husband and wife before marriage, are extinguished by the marriage, if they are for debts or things due in præsentî, or at or on a future time or event which may occur during, and not after the determination of, the coverture. But Courts of Equity, although they generally follow the same doctrine, will enforce such contracts, where it would be in furtherance of the manifest intention and object of the parties to do so; as in the case of an agreement on the marriage, by



husband and wife, for the mutual settlement of their estate, or of the estate of either of them, on the other, even without the intervention of trustees (a). 3192.

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CH. 3, s. 2.

II. Contracts made between husband and wife after marriage, are a mere nullity at common law; but, under particular circumstances, they will be enforced in equity, where they are of a reasonable nature. Thus, if the husband should contract with his wife, for good reasons, that she should separately possess and enjoy property bequeathed to her, the contract would be upheld in equity (b). And by the stat. 33 & 34 Vict. c. 93, s. 11, "a married woman may maintain an action, in her own name, for the recovery of any property belonging to her before marriage, and which her husband shall, by writing under his hand, have agreed with her shall belong to her after marriage as her separate property." [But this Act is now repealed, except as to any act done or right acquired when in force, or as to any right or liability to sue or be sued, accrued before the 1st of January, 1883, of any husband or wife married before that date; and every married woman has against all persons, including her husband, with respect to her own separate property, the same remedies as if she were a femme sole (c).] And the wife may even become a creditor of her husband; and her rights, as such, will be enforced against him and his representatives. Thus, if a wife raises money out of her estate to answer his necessities, whatever be the mode adopted to carry that purpose into effect, she is, in equity, entitled to reimbursement out of his estate (d). But a contract by a husband to transfer to his wife his rights and duties in reference to his children, is contrary to public policy, and

II. Contracts  
after  
marriage.

(a) Story's Eq. Jur. § 1370, 1371;  
2 Pres. Shep. T. 335, 395.

*Teasdale v. Braithwaite*, L. R. 4 Ch.  
D. 85.

(b) See Story's Eq. Jur. § 1372;  
*Hewison v. Negus*, 16 Beav. 594;  
*Anderson v. Abbott*, 23 Beav. 457;

(c) See stat. 45 & 46 Vict. c. 75,  
ss. 1 and 12, in Appendix.

(d) Story's Eq. Jur. § 1373.

PT. IV. T. 1,  
CH. 3, N. 2.

will not be enforced (*a*), unless his conduct has been such, that the Court would remove the children from his custody (*b*). **3193.**

[Now, however, a married woman is capable of entering into, and rendering herself liable in respect and to the extent of her separate property on any contract, and of suing and being sued as if she were a femme sole. . Also any money or other estate, lent or entrusted by her to her husband for the purpose of any trade or business carried on by him or otherwise, is treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims by the other creditors of the husband for valuable consideration in money or money's worth are satisfied. And every married woman has, in her own name, against all persons, including her husband, the same civil remedies for the protection and security of her own separate property, as if it belonged to her as a femme sole (*c*).] **3193a.**

III. Gifts  
and grants  
after  
marriage.

III. At the common law a wife cannot grant to her husband, because they make but one person at law. And for the same reason, a wife cannot by the common law be the immediate grantee of her husband, but she may take an estate from him through the medium of a third person under the Statute of Uses (*d*). And as an appointee takes under the original deed, so, although a husband cannot at common law convey directly to his wife, yet he may make an immediate appointment to her, because her estate arises out of the original seisin. And for the same reason, a wife may appoint immediately to her husband. In like

(*a*) *Vansittart v. Vansittart*, 4 K. & J. 62; 2 D. & J. 249; *Walrond v. Walrond*, 1 Johns. 18.

(*b*) *Swift v. Swift*, 34 Beav. 266.

(*c*) See stat. 45 & 46 Vict. c. 75,

ss. 1, 3 and 12, in Appendix.

(*d*) Co. Litt. 3 a, and n. (1); 112 a; 187 b; 4 Cruise T. 32, c. 2, § 40; 1 Cruise T. 11, c. 3, § 25; Burton, § 211; Watk. Conv. 3rd ed. by Prest. 249, 250.

manner a surrender of copyholds by the husband to the wife, or by the wife to her husband, is good (*a*). And gifts and grants by a husband to his wife, though directly and immediately, will be enforced in equity, if they are of a reasonable nature, and there is no ground to suspect fraud. Thus, gifts made by the husband to the wife to purchase clothes or personal ornaments, or for her separate expenditure, and personal savings and profits made by her in her domestic management, which the husband allows her to apply to her own separate use, will be held to vest in her, as against her husband, but not as against his creditors, an unimpeachable right of property therein, so that they may be treated as her separate estate, if such gifts are established by clear and incontrovertible evidence (*b*). If a husband makes presents of chattels to his wife, even verbally, and without any words of separate use, her right to them will be enforced against his residuary legatee, if the gift is proved by the testimony of any one who heard him use words of gift, or to whom he afterwards stated that he had given the chattels, or that they were hers. But the Court will not act upon the unsupported oath of the wife (*c*). [But the old law regulating gifts and grants by husbands and wives to each other, is now modified by the fact that a married woman with respect to her separate property, is placed in the position of a femme sole, and by other changes recently made in the law respecting the property of married women, and referred to in other parts of this chapter.] 3194.

PT. IV. T. 1,  
CH. 3. s. 2.

### SECTION III.

*The Interest of the Husband in the Wife's Property which is not settled to her separate use.*

PT. IV. T. 1,  
CH. 3, s. 3.

[In cases where the marriage took place before the 1st Husband's

(*a*) 2 Sugd. Pow. 24; Watk. Com. 3rd ed. by Prest. 249, 250.

(*b*) Story's Eq. Jur. § 1374, 1375.

(*c*) *Grant v. Grant*, 34 Beav. 623.

Pt. IV. T. 1,  
Ch. 3, s. 3.

interest in  
the wife's  
real estate.

of January, 1883, and the wife's property accrued to her before that date, the] husband takes a freehold interest during the joint lives of himself and his wife, in land belonging to her in fee simple, in tail, or for life; and such interest will pass by a conveyance executed by the husband alone (a). But in strict legal language, where the wife has an estate, it is said that the husband and wife (and not the husband only) are seised in right of the wife (b). Anciently, the husband had power over his wife's land by feoffment or fine, to make such an alienation of it that she could not enter upon it after his death, but must pursue her right by action. This power is taken away by stat. 32 Hen. 8, c. 28, s. 6 (c). And a contract by the husband as to the wife's real estate will not bind her at law or in equity (d). **3195.**

Husband's  
interest in  
wife's  
chattels  
real.

A chattel real which the wife has in her own and not in another's right, and which is not settled to her separate use, vests in the husband, not absolutely, but sub modo. Thus the husband is possessed of the wife's term for years in her right, and hence he is entitled to receive all the rents and profits of it. He may also sell, surrender in deed or in law, or dispose of it during the coverture, so that even if the wife survive, she will have no right to it, unless it is reversionary and could by no possibility be reduced into possession during the coverture. If he mortgages it, and the estate of the mortgagee becomes absolute, the wife's legal right by survivorship will be barred, but she will in general be entitled to the equity of redemption, if she survives. If the husband was outlawed, attainted, or convicted of felony, or *felo de se*, it used to be forfeited to the Crown. It is liable to execution for his debts; and, if he survives his wife, it is to all intents and purposes his own. Yet if

(a) Co. Litt. 351 a; 2 Steph. Com. 4th ed. 260; *Robertson v. Norris*, 11 Ad. & E. (N. S.) 916.

(b) Burton, § 757.

(c) Burton, § 220.

(d) Sugd. Concise View, 147.

he has made no disposition thereof in his lifetime, and dies before his wife, he cannot dispose of it by will, inas-  
much as it has not been transferred from the wife (a).

Pt. IV. T. 1,  
CH. 8, s. 3.

**3196.**

As to chattels personal in possession which the wife has in her own right, as ready money, jewels, household goods, and the like, the husband has an immediate and absolute property therein by the marriage, which never can again revest in the wife or her representatives, subject to an exception created by ss. 21 and 25 of the stat. 20 & 21 Vict. c. 85 (b). But chattels personal, *en autre droit*, as executrix or administratrix, etc., do not belong to the husband, though he survive, but go to the administrator de bonis non of the wife (c). **3197.**

Husband's  
interest in  
wife's  
chattels  
personal.

As to the wife's chattels personal or choses in action, which comprise debts, legacies, residuary personal estate, money in the funds, money received by a person to be appropriated to her use, etc., these the husband may have if he reduces them into possession. They then become absolutely and entirely his own, and go to his executors and administrators, or as he bequeaths them by will, and shall not revest in the wife. But if he dies before her, and before he has released them or reduced them into possession, so that at his death they still continue choses in action, they survive to the wife, whether against the personal representatives of the husband, or against the trustees in bankruptcy or insolvency, or his assignees for valuable consideration. If he survives her, he will not have them by survivorship, as he would have a chattel real, except in the case of arrears of rent due to the wife before her coverture, which in case of her death are given

(a) 2 Bl. Com. 434 ; Co. Litt. 46 b, 351 a, and n. 1 ; 1 Bright's Husband and Wife, 94, 95, 98, 99, 100, 105—6, 110 ; *Donne v. Hart*, 2 Russ. & M. 361 ; *Duberley v. Day*,

16 Beav. 33 ; 5 H. L. Cas. 388.

(b) See *supra*, par. 3186.

(c) 2 Bl. Com. 435 ; Co. Litt. 351 b ; 1 Bright's Husb. and Wife, 34, 39.

PT. IV. T. 1,  
CH. 3, S. 3.

to the husband by the stat. 32 Hen. 8, c. 37; but he will still be entitled to the chose in action as her administrator, and may in that capacity recover such things in action as became due to her before or during the coverture (*a*). On taking out administration to her estate, he will become entitled, as her administrator, to all her personal estate which was outstanding and unrecovered at her death. And if he does not take out administration to her estate, but some other person does, the husband will be entitled to any surplus which may remain after paying the wife's debts. If the husband dies before he or some other person has administered to her estate, his personal representatives may take out letters of administration to her estate, and recover all her property in action and unrecovered at her death, even though such property was reversionary at her death, and in fact did not cease to be so until after the death of the husband, as where he died in the lifetime of a prior taker of the property; or, if the personal representatives of the husband do not take out administration to her estate, any other personal representatives of the wife may recover such property. But such personal representatives are trustees for the persons beneficially entitled to his general personal estate, under his will, or under the statutes of distribution, or under his bankruptcy or insolvency, or otherwise, as the case may be, as to any surplus which may remain after paying the wife's debts (*b*). **3198.**

The foregoing paragraphs must be read subject to the modifications of the law relating to the property of married women, introduced by the stat. 33 & 34 Vict. c. 93 (*c*), [in cases to which that Act, which is now repealed by

(*a*) 2 Bl. Com. 434—5; Co. Litt. 351 b.

(*b*) See 1 Bright's Husb. and Wife, 36, 41, 42, 72, 77—8; 1 Wms. on Exors. 6th ed. 815; *Drew v. Long*,

22 L. J. 717 (V. C. K.); *Att.-Gen. v. Partington*, 1 Hurl. & Colt. 193; *Fleet v. Perrins*, L. R. 3 Q. B. 536; 4 Q. B. (Ex. Ch.) 500.

(*c*) See *infra*, par. 3216—3227.

[stat. 45 & 46 Vict. c. 75 (Appendix), has application.] PT. IV. T. 1,  
CH. 3, S. 3.  
3199.

Where the wife is the proprietor of land-tax redeemed, and the husband obtains a certificate of his title by virtue of his marriage, he may dispose of the whole. But if he only makes a mortgage of it, though he reserves the equity of redemption to himself alone, it is only a disposition *pro tanto*, and if the wife survives, the equity of redemption will belong to her (a). 3200.

As to the disposition of the reversionary interest of married women in chattels personal (in cases not within the stat. 20 & 21 Vict. c. 57), the general result of the cases may be briefly stated in these general terms (b):—

Disposition of the reversionary interests of married women in chattels personal, in cases not within 20 & 21 Vict. c. 57.

1. An assignment by a married woman of a vested reversionary interest in chattels personal, if bequeathed or settled to her separate use, will be binding upon her even after the determination of the coverture. 2. A married woman cannot directly deprive herself or be deprived of a vested reversionary interest, as such, in personalty not given for her separate use, so effectually that she will be precluded from asserting a claim to it, if her husband dies before her without having reduced it into possession. 3. According to the decisions in *Lachton v. Adams* (c), *Creed v. Perry* (d), and *Wilson v. Oldham*, cited by Mr. Lewin in his work on Trusts, 2nd ed. 296, and according to the opinion of that eminent lawyer, the late Mr. Jacob, as stated by Mr. Lewin, a married woman may deprive herself or be deprived of chattels personal in which she has a vested reversionary interest, by means of the conversion of that reversionary interest into an interest in possession in herself, through the operation of merger consequent upon a surrender or assignment made to her of the prior life interest, where at least the person to

(a) *Pigott v. Pigott*, L.R. 4 Eq. 549. Jurist 231, 243.

(b) See an article on the subject, (c) 5 L. J. (N. S.) Chanc. 382.  
by the writer of these pages, 10 (d) 2 Eq. Rep. 42.

PT. IV. T. 1,  
CH. 8, S. 8.

whom that prior life interest is limited is some other person than her own husband, and by means of a subsequent reduction of the property into the possession of the husband. But according to the decision of Lord Langdale and Lord Cottenham (*a*), a married woman cannot so deprive herself or be deprived by means of such a merger and acceleration of chattels personal in which she has a vested reversionary interest. The writer of these pages conceives that the opinion of Mr. Jacob was right, for the reasons given by the writer in the article already referred to (*b*), and that the decision in *Whittle v. Henning* was wrong; but in the absence of any decision of the question by the House of Lords, the doctrine of Lord Cottenham in *Whittle v. Henning* must be deemed to be the law of the land (*c*). 4. If the reversionary interest of a married woman in personalty is contingent, and bequeathed or settled to her separate use, and, à fortiori, if it is contingent and not settled to her separate use, she cannot deprive herself or be deprived of it, so as to be bound after the determination of the coverture. 3201.

Stat. 20 & 21  
Vict. c. 57.

Disposal of  
reversionary  
interests of  
married  
women, and  
release of  
their powers  
or their  
right to a  
settlement.

By the stat. 20 & 21 Vict. c. 57, it is enacted as follows:—"1. After the 31st day of December, 1857, it shall be lawful for every married woman by deed to dispose of every future or reversionary interest, whether vested or contingent, of such married woman, or her husband in her right, in any personal estate whatsoever to which she shall be entitled under any instrument made after the said 31st day of December, 1857 (except such a settlement as after mentioned), and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any such personal estate, as fully and effectually as she could do if she were a femme sole, and also to release and extinguish her right or equity to a

(*a*) *Whittle v. Henning*, 11 Beav. 222, and 2 Phil. 731.

(*c*) 2 Tudor's Lead. Cas. in Equity, 580.

(*b*) *Supra*, page 1277 n. (*b*).



settlement out of any personal estate to which she or her husband in her right, may be entitled in possession under any such instrument as aforesaid; save and except that no such disposition, release, or extinguishment shall be valid unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed: Provided always, that nothing herein contained shall extend to any reversionary interest to which she shall become entitled by virtue of any deed, will, or instrument by which she shall be restrained from alienating or affecting the same (s. 1). 2. Every deed to be executed in England or Wales by a married woman for any of the purposes of this Act shall be acknowledged by her, and be otherwise perfected, in the manner in and by the Act passed in the third and fourth years of the reign of his late Majesty King William the Fourth, intituled An Act for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance, prescribed for the acknowledgment and perfecting of deeds disposing of interests of married women in land; and every deed to be executed in Ireland by a married woman for any of the purposes of this Act shall be acknowledged by her and be otherwise perfected in the manner in and by the Act passed in the fourth and fifth years of the reign of his late Majesty King William the Fourth, intituled An Act for the abolition of fines and recoveries, and the substitution of more simple modes of assurance, in Ireland, prescribed for the acknowledgment and perfecting of deeds disposing of interests of married women in land; and all and singular the clauses and provisions in the said Acts concerning the disposition of lands by married women, including the provisions for dispensing with the concurrence of the husbands of married women, in the cases in the said Act mentioned, shall extend and be applicable to such interests in personal estate and to such powers as may be disposed

Pr. IV. T. 1,  
Ch. 3, s. 8.

Deeds by  
them to be  
acknow-  
ledged.

PT. IV. T. 1,  
CH. 3, s. 3.

The power  
under this  
Act not to  
interfere  
with other  
powers.

Interests of  
women  
under their  
marriage  
settlements  
not to be  
affected.

Arrears of  
income of  
wife's  
chooses in  
action.

Release by  
husband.

of, released, or extinguished by virtue of this Act, as fully and effectually as if such interests or powers were interests in or powers over land (s. 2). 3. Provided always, that the powers of disposition given to a married woman by this Act shall not interfere with any power which independently of this Act may be vested in or limited or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under this Act she may be prevented from so doing, in consequence of such power having been suspended or extinguished by such disposition (s. 3). 4. Provided always that the powers of disposition hereby given to a married woman shall not enable her to dispose of any interest in personal estate settled upon her by any settlement or agreement for a settlement made on the occasion of her marriage" (s. 4). **3202.**

Arrears of income of the wife's property consisting of choses in action not reduced into possession by the husband, belong to the wife by survivorship, and not to the representatives of the husband or his assignees (a). **3203.**

Where the wife has any right or duty which by possibility may arise during the coverture, the husband may by release discharge it (b). A husband may release a personal annuity secured by bond to which his wife is entitled, so as to bind his wife, even if she survives him (c). And at law a man may even release a cause of action which his wife has as executrix or administratrix (d). But where the wife has a right or duty which cannot by any possibility accrue to her during the coverture, the husband cannot release it (e). **3204.**

[This section has reference to the law respecting the property of married women, in cases in which the mar-

(a) *Wilkinson v. Charlesworth*,  
10 Beav. 334.

(b) 2 Pres. Shep. T. 322.

(c) *Hore v. Becher*, 12 Sim. 465.

(d) 2 Pres. Shep. T. 333.

(e) 2 Pres. Shep. T. 322; 1  
Bright's *Husb. & Wife*, 73.

riage took place before the 1st of January, 1883, and in PT. IV. T. 1,  
CH. 3, s. 3. which the property accrued to the wife before that date, which are not affected by the stat. 45 & 46 Vict. c. 75 (Appendix).] **3204a.**

#### SECTION IV.

##### *Pin-Money and Paraphernalia.*

I. Pin-money is not deemed to be an absolute gift. It PT. IV. T. 1,  
CH. 3, s. 4. is not considered like money set apart for the sole and separate use of the wife during coverture; but it is a sum I. Pin-money. payable by the husband to the wife, in virtue of a particular arrangement, and to be applied by the wife in attiring her person in a manner suitable to the rank of her husband, and in defraying other personal expenses—a sum allowed to save the trouble of a constant recourse by the wife to the husband, in order to meet her ordinary personal expenses (a). **3205.**

Such being the peculiar nature of this provision, the wife cannot make such a disposition of it as she can of her Arrears thereof. separate estate. And Courts of Equity refuse to call upon the husband to pay beyond the arrears of a year, although stipulated for by a marriage settlement. For, setting aside the presumed satisfaction by acquiescence, the money is meant to dress the wife during the year, so as to keep up the dignity of the husband, and not for the purpose of accumulation. And, on the same principle, the personal representatives of the wife are not allowed to make any claim even for arrears of a year (b). **3206.**

II. The wife's paraphernalia are personal apparel and II. Paraphernalia. ornaments of the wife, suitable to her rank and condition in life (c). Old family jewels, although worn by the wife,

(a) See Story's Eq. Jur. § 1375 a, and note; 2 Spence's Eq. Jur. 500, 501. and note; 2 Spence's Eq. Jur. 501.

(b) Story's Eq. Jur. § 1375 a, and note; 2 Spence's Eq. Jur. 500, 501.

and note; 2 Spence's Eq. Jur. 501.

(c) Story's Eq. Jur. § 1376; 11 Jarm. & Byth. by Sweet, 442; 2 Bl. Com. 486.

Pr. IV. T. 1,  
CH. 3, s. 4. do not constitute a part of her paraphernalia, unless she has acquired them by gift or bequest (*a*). **3207.**

Rule of law  
respecting  
them.

Rule of  
equity,  
where they  
were given  
by the  
husband ;

or where  
given by  
any one  
else.

At law, the husband may, in his lifetime, but not by his will, dispose of the wife's paraphernalia, with the exception of necessary apparel. And they are liable to the claims of creditors, with the like exception. And if the articles were given by the husband, either before or after marriage, Courts of Equity fully recognise this right of the husband and his creditors, instead of treating the articles as absolute gifts to the wife, as her own separate property ; although in the case of creditors claiming against the assets of the husband, the personal assets of the husband will be marshalled against his representatives, in favour of the widow. But if the articles were bestowed on the wife by any one else, they will be deemed absolute gifts to her separate use ; and then, if received with the consent of the husband, neither he or his creditors can dispose of them (*b*). **3208.**

[This section also describes the law in cases unaffected by the stat. 45 & 46 Vict. c. 75 (Appendix).] **3208a.**

## SECTION V.

### *The Wife's separate Estate.*

Pr. IV. T. 1,  
CH. 3, s. 5.

I. Means of  
acquiring it.

1. By gift,  
grant,  
devise, or  
settlement.

I. With regard to the means of acquiring a separate estate—

1. Whenever real or personal estate is given, granted, or devised to, or settled on, a woman, either with or without the intervention of trustees, whether after marriage, or as a provision on marriage, or not in contemplation of immediate marriage, and whether by her husband or by a mere stranger, it will be separate estate, if it clearly appears from the deed or will itself that the property was

(*a*) *Jerroise v. Jerroise*, 17 Beav. 566.

11 Jarm. & Byth. by Sweet, 442 ; 2 Bl. Com. 436.

(*b*) Story's Eq. Jur. § 1376, 1377;

intended for her separate use (*a*). Two things must concur: PT. IV. T. 1,  
CH. 8, S. 5. First, an intention to benefit the wife; and secondly, an intention to exclude the husband (*b*). Thus, not to mention other instances where the intention is more obvious, a legacy to a married woman, with a declaration "that her receipt alone shall be a sufficient discharge to the executors," amounts to a bequest for her separate use. So a bequest to a married woman "for her own use, and at her own disposal," has been held to be a bequest to her separate use (*c*). But where the expressions do not clearly show that the husband is to be excluded from his marital rights, the wife will not take for her separate use. Thus in the case of a direction to pay money into her own proper hands "for her own use and benefit," it has been held, that, although the money is to be for her own use, yet there is nothing in that inconsistent with its being subject to the husband's marital rights (*d*). And a direct devise or bequest "for her sole use and benefit," to a woman who is either single or will become discovert on the death of the testator, does not amount to a gift to her separate use (*e*); unless aided by other expressions in the will, or other circumstances, such as the fact that the instrument shows that the marriage of the person spoken of was contemplated by the author of it (*f*). But a gift, by way of trust, "for her sole benefit," to a married woman does create a separate estate (*g*). And where a precatory

(*a*) Story's Eq. Jur. § 1380, 1381, 1384; 2 Spence's Eq. Jur. 502, 507, 511; 2 Rep. Leg. by White, 1414; 2 Jarm. Wills, 2nd ed. 19, 20; *Goulden v. Camm*, 1 D. F. & J. 146.

(*b*) *Bland v. Daves*, L. R. 17 Ch. D. 794.

(*c*) Story's Eq. Jur. § 1382; 2 Spence's Eq. Jur. 507; 2 Rep. Leg. by White, 1414; 2 Jarm. Wills, 2nd ed. 19.

(*d*) Story's Eq. Jur. § 1383; 2 Spence's Eq. Jur. 508—511; 2 Jarm. Wills, 2nd ed. 19, 20. See also *Spirett v. Willows*, 3 D. J. & S. 293.

(*e*) *Gilbert v. Lewis*, 1 D. J. & S. 38. See also *Lewis v. Matthews*, L. R. 2 Eq. 177.

(*f*) *In re Tassey's Trust*, L. R. 1 Eq. 561.

(*g*) *Green v. Britten*, 1 D. J. & Sm. 649.

PT. IV. T. 1,  
CH. 3, s. 5.

trust has been created by will in favour of "children" simpliciter, the trustee may, in executing the trust, limit the shares of the daughters to their separate use (a). 3209.

Where personal chattels are given for the separate use of a married woman, a trustee should always be interposed, in order to exclude the legal title of the husband, who might otherwise defeat the trust by delivering the property to a purchaser, etc., without notice (b). 3210.

If a husband assigns furniture to a trustee for the use and benefit of his wife, though it be in consideration of money held in trust for her separate use, and given up to the husband, the assignment of the furniture is void as against his trustees in bankruptcy, if it remains in the joint possession of the husband and wife, unless registered under the Bills of Sales Act (c). 3211.

2. By carrying on a separate trade in London, or even elsewhere, by agreement before marriage;

2. By the custom of London, a married woman may carry on trade within the City, as a sole trader, and be liable as such. But, independently of any such custom, if it was agreed between the husband and wife, before marriage, that the wife shall be allowed to carry on a separate trade, such an agreement will be maintained at law against the husband; and being an agreement for valuable consideration, namely, that of the intended marriage, it will also be maintained at law against his creditors. And if such an agreement is made after marriage, and trustees are interposed, it will be maintained at law against the husband; and, if it is for valuable consideration, against his creditors also; for in such case, the wife's trustees will, at law, be entitled to the property assigned, and to the increase and profits thereof, and she will be considered, at law, as their agent, and her possession as their possession. The trustees, however,

or by agreement after marriage;

(a) *Willis v. Kymer*, L. R. 7 Ch. 446.  
D. 181.

(c) *Ashton v. Blackshaw*, L. R. 9 Eq. 510.

will be regarded, in equity, as holding such property, and receiving the increase and profits thereof, for the sole and separate use of the wife. And thus, in such cases, where trustees are interposed, the beneficial interest in the property, and the increase and profits thereof, are secured to the wife by the joint operation of law and equity. By the operation of law, the legal estate is vested in the trustees, and taken out of the power of the husband. By the operation of equity, the beneficial interest is vested in, and secured to, the wife, against her husband, and, if the agreement is for valuable consideration, against his creditors also. But even where there are no trustees interposed, such an agreement has the force, in equity, of creating a separate estate for the wife, and securing it against the husband, and, if the agreement is for valuable consideration, against his creditors also. And this is the case even though it be a mere implied agreement. So that if the husband should permit his wife, after the marriage, to carry on business on her sole and separate account, all her earnings in the trade, and all the capital, stock in trade, and effects, by the aid of which they are made will be her separate property. And if a husband should desert his wife, and she should be enabled, by the aid of her friends, to carry on a separate trade, her earnings in such trade will be enforced in equity against her husband (a), independently of the statute 20 & 21 Vict. c. 85, ss. 21, 25. **3212.**

PT. IV. T. 1,  
CH. 3, s. 5.

even though  
the agree-  
ment be  
merely  
implied.

Where the property is vested in trustees, care must be taken that the negotiations are not carried on in the name of the wife, as by taking notes or other securities in her name; for then they will, at law, be held to belong to the husband, although it will be otherwise in equity (b). **3213.**

(a) See Story's Eq. Jur. § 1385—  
1387; 2 Spence's Eq. Jur. 503;  
*Ashworth v. Outram*, L. R. 5 Ch.

D. (Ap.) 923, 937.

(b) Story's Eq. Jur. § 1386.

PT. IV. T. 1.  
CH. 3, s. 5.

3. By stat.  
20 & 21 Vict.  
c. 85, and  
21 & 22 Vict.  
c. 108.

3. By the stat. 20 & 21 Vict. c. 85, s. 21, and 21 & 22 Vict. c. 108, s. 8, if a wife is deserted by her husband, she may obtain an order of protection of her property against her husband and his creditors; and by s. 25 of the former Act, if she is judicially separated, she is to be considered as a femme sole as regards her property; and in case of subsequent cohabitation, it shall be held to her separate use, subject to any agreement (a). **3214.**

This Act is retrospective, extending back to the commencement of the desertion; so that a will made by the woman after desertion, and before the order of protection, operates upon property acquired by her since and during the whole period of desertion (b). **3215.**

4. Under  
the stat. 33  
& 34 Vict. c.  
93; and the  
stat. 45 & 46  
Vict. c. 75.

[The stat. 33 & 34 Vict. c. 93 contains various enactments providing that the wages and earnings of married women, their deposits in savings banks, property in the funds, in joint stock companies, and in various societies, as well as property coming to them after marriage, and policies of assurance effected by them or by their husbands, should belong to them for their separate use, and also giving them power to maintain actions in respect thereof. But that Act is now repealed except as to acts done and rights and liabilities accrued thereunder, before the date of the repeal, by section 22 of the stat. 45 & 46 Vict. c. 75 (Appendix), which enacts by s. 2, "Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation, in which she is engaged, or which she carries on

Property of  
a woman  
married  
after the  
Act to be  
held by her  
as a femme  
sole.

(a) See supra, par. 3186—3191. L. R. 2 Prob. & M. 274.

(b) *In the Goods of Ann Elliott*,



[separately from her husband, or by the exercise of any literary, artistic, or scientific skill." **3216.**

Pr. IV. T. 1,  
Ch. 3, s. 5.

And by s. 5, "Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid." **3217.**

Property  
acquired  
after the Act  
by a woman  
married be-  
fore the Act  
to be held by  
her as a  
femme sole

By s. 6, "All deposits in any post office or other savings bank, or in any other bank, all annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, and all sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England, or of any other bank, which at the commencement of this Act are standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of this Act are standing in her name, shall be deemed, unless and until the contrary be shown, to be the separate property of such married woman; and the fact that any such deposit, annuity, sum forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England or of any other bank, share, stock, debenture, debenture stock, or other interest as aforesaid, is standing in the sole name of a married woman, shall be sufficient *prima facie* evidence that she is beneficially entitled thereto for

As to stock,  
etc. to which  
a married  
woman is  
entitled.

Pr. IV. T. 1,  
CH. 3, s. 5.

[her separate use, so as to authorise and empower her to receive or transfer the same, and to receive the dividends, interest, and profits thereof, without the concurrence of her husband, and to indemnify the Postmaster General, the Commissioners for the Reduction of the National Debt, the Governor and Company of the Bank of England, the Governor and Company of the Bank of Ireland, and all directors, managers, and trustees of every such bank, corporation, company, public body, or society as aforesaid, in respect thereof." 3218.

As to stock  
etc., to be  
transferred  
etc., to a  
married  
woman.

By s. 7, "All sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, and all such deposits and annuities respectively as are mentioned in the last preceding section, and all shares, stock, debentures, debenture stock, and other interests of or in any such corporation, company, public body, or society, as aforesaid, which after the commencement of this Act shall be allotted to or placed, registered, or transferred in or into or made to stand in the sole name of any married woman shall be deemed, unless and until the contrary be shown, to be her separate property, in respect of which so far as any liability may be incident thereto her separate estate shall alone be liable, whether the same shall be so expressed in the document whereby her title to the same is created or certified, or in the books or register wherein her title is entered or recorded, or not.

"Provided always, that nothing in this Act shall require or authorise any corporation or joint stock company to admit any married woman to be a holder of any shares or stock therein to which any liability may be incident contrary to the provisions of any Act of Parliament, charter, byelaw, articles of association, or deed of settlement regulating such corporation or company." 3219.

Investments

By s. 8, "All the provisions hereinbefore contained as

[to deposits in any post office or other savings bank, or in any other bank, annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, shares, stock, debentures, debenture stock, or other interests of or in any such corporation, company, public body, or society as aforesaid respectively, which at the commencement of this Act shall be standing in the sole name of a married woman, or which, after that time, shall be allotted to, or placed, registered, or transferred to or into, or made to stand in, the sole name of a married woman, shall respectively extend and apply, so far as relates to the estate, right, title, or interest of the married woman, to any of the particulars aforesaid which, at the commencement of this Act, or at any time afterwards, shall be standing in, or shall be allotted to, placed, registered, or transferred to or into, or made to stand in, the name of any married woman jointly with any persons or person other than her husband." **3220.**

PR. IV. T. 1,  
CH. 3, s. 5.

in joint  
names of  
married  
women and  
others.

By s. 9, "It shall not be necessary for the husband of any married woman, in respect of her interest, to join in the transfer of any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society as aforesaid, which is now or shall at any time hereafter be standing in the sole name of any married woman, or in the joint names of such married woman and any other person or persons not being her husband." **3221.**

As to stock,  
etc., standing  
in the joint  
names of a  
married  
woman and  
others.

By s. 10, "If any investment in any such deposit or annuity as aforesaid, or in any of the public stocks or funds,

Fraudulent  
investment  
with money  
of husband.

**Pt. IV. T. 1.**  
**CH. 3, s. 5.**

[or in any other stocks or funds transferable as aforesaid, or in any share, stock, debenture, or debenture stock of any corporation, company, or public body, municipal, commercial, or otherwise, or in any share, debenture, benefit, right, or claim whatsoever in, to, or upon the funds of any industrial, provident, friendly, benefit, building, or loan society, shall have been made by a married woman by means of moneys of her husband, without his consent, the Court may, upon an application under section seventeen of this Act, order such investment, and the dividends thereof, or any part thereof, to be transferred and paid respectively to the husband; and nothing in this Act contained shall give validity as against creditors of the husband to any gift, by a husband to his wife, of any property, which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his creditors; but any moneys so deposited or invested may be followed as if this Act had not passed.”

**3222.**

**Moneys payable under policy of assurance not to form part of estate of the insured.**

By s. 11, “A married woman may by virtue of the power of making contracts hereinbefore contained effect a policy upon her own life or the life of her husband for her separate use; and the same and all benefit thereof shall enure accordingly.

“A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the

[estate of the insured, or be subject to his or her debts: Pr. IV. T. 1,  
CH. 3, s. 5.  
 Provided, that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid. The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured and his or her legal personal representatives, in trust for the purposes aforesaid. If, at the time of the death of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by any Court having jurisdiction under the provisions of the Trustee 13 & 14 Vict.  
c. 60. Act, 1850, or the Acts amending and extending the same. The receipt of a trustee or trustees duly appointed, or, in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representative of the insured shall be a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or in part." **3223.**

By s. 12, "Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if Remedies  
of married  
woman for  
protection  
and security  
of separate  
property.

Pr. IV. T. 1.  
CH. 3, s. 5.

[such property belonged to her as a femme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife." The provision empowering a husband or wife to give evidence against each other, and the concluding proviso of this section are entirely new, and have no counterpart in the provisions of the repealed Act. **3224.**

Questions  
between  
husband and  
wife, as to  
property to  
be decided  
in a sum-  
mary way.

Also by s. 18, provision is made for the settlement of questions between husband and wife as to the title to or possession of property, in a summary way, on the application of either party, or of the bank, corporation, company, or society to which the property in dispute belongs. **3225.**

Legal per-  
sonal repre-  
sentative of  
married  
woman.

And by s. 23, it is enacted that "For the purposes of this Act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living." **3226.**

Property

The word "property" in stat. 45 & 46 Vict. c. 75 includes a thing in action (a).] **3227.**

(a) See s. 24 of the Act in Appendix.

II. As to the wife's power of disposing of her separate estate, all pre-nuptial agreements for securing to the wife separate personal property, will confer on her, in equity, unless the contrary be expressly stipulated or implied, the same power of disposing of such separate property, by will or otherwise, as an unmarried woman would have (a). **3228.**

PT. IV. T. 1,  
CH. 3, s. 5.

II. Wife's  
power of  
disposing of  
separate  
estate ;

where it has  
arisen from  
a pre-nuptial  
agreement ;

With respect to her power of disposing of her separate property, where no trustee is interposed, and it rests merely on a post-nuptial agreement of the husband, if the property consists of personalty or an estate for life in real property, her disposal thereof can affect her husband's rights alone ; and therefore his assent is conclusive upon him. And if real property is settled upon her in fee in trust for her separate use, without any special power of appointment, she may dispose of or charge the rents and profits accruing during her life. But it was formerly held that she could only dispose of the inheritance by the ordinary means by which married women dispose of their real property ; because, in regard to real estate, her own heirs are or may be affected in their interest by descent (b). Separate use, however, has a meaning as attached to corpus or capital as well as when attached to income. As regards corpus or capital, it gives her the same power of alienation over it as if she were a single woman. And if she has an estate tail to her separate use, though she be restrained from alienation of the rents and profits, she may, with the concurrence of her husband, even after his bankruptcy, bar the entail, and thereby preclude him and his trustee in bankruptcy from any estate by the curtesy (c). **3229.**

where it has  
arisen from  
a post-  
nuptial  
agreement  
of the  
husband ;

And where an estate of inheritance was given her by a **where it is**

(a) Story's Eq. Jur. § 1390 ; 2  
Spence's Eq. Jur. 506, 507.

remarks of V.-C. Kindersley, in  
*Moore v. Morris*, 4 Drewry 37—8.

(b) Story's Eq. Jur. § 1391 ; 2  
Spence's Eq. Jur. 504, 513 ; and see

(c) *Cooper v. Macdonald*, L. R.  
7 Ch. D. (Ap.) 288.

PT. IV. T. 1,  
CH. 3, s. 5.

given by a  
third person  
before or  
during the  
coverture.

third person, during the coverture, or as it seems, before coverture, for her separate use, it was formerly held that she could not dispose of it, except by those means (that is by a deed duly acknowledged under the Fines and Recoveries Act) or under a power: but if such a power was expressly given her, she might dispose of the estate, even though there were no trustees interposed to protect the execution of the power (a). **3230.**

It has been subsequently held, however, that she, like a femme sole, by virtue of her ownership, may, by deed or will, dispose of an estate of inheritance or of personalty settled to her separate use, even though a special power of appointment be given her (b). **3231.**

Where personal property, whether in possession or reversion, or a life interest in real property, is given by a third person, for the separate use of a married woman, she has, in effect, a full power to dispose of it, unless, from the words of the gift, it appears, beyond a reasonable doubt, to have been the intention of the giver that this absolute power should not exist (c). **3232.**

Where a  
married  
woman has  
a life  
interest for  
her separate  
use, with a  
reversion.

But where trustees hold personal property in trust for a married woman absolutely, and to apply the income for her separate use for life, she has a life interest and a reversion; and she had the power of disposition of her life interest during coverture, but no power of disposing of the reversion until she was discoverd (d). **3233.**

III. Restric-  
tions against  
alienation  
or anticipa-  
tion.

III. Real property, whether in fee or for life, and personal property may be given or settled to the separate use of a woman, though unmarried at the time when the gift

(a) Story's Eq. Jur. § 1388, 1392; 2 Spence's Eq. Jur. 504, 507; *Harris v. Mott*, 14 Beav. 169; *Lechmere v. Brotheridge*, 32 Beav. 353.

(b) *Taylor v. Meads*, 34 L. J. Ch. 203; *Pride v. Bubb*, L. R. 7 Ch. Ap. 64; *Bishop v. Wall*, L. R. 3 Ch. D. 194.

(c) See Story's Eq. Jur. § 1393, 1394; 2 Spence's Eq. Jur. 513; *Lechmere v. Brotheridge*, 32 Beav. 353.

(d) *Hanchett v. Briscoe*, 22 Beav. 496; but this is modified by stat. 45 & 46 Vict. c. 38, in Appendix.



or settlement takes effect, and the gift may be accompanied by a prohibition of alienation or anticipation. But a separate estate and a mere prohibition of alienation or anticipation are both suspended whilst and as often as a woman is discovert: for, the separate estate of course only exists during coverture, and the prohibition of alienation or anticipation is exclusively annexed to the separate estate; because such prohibition, without a clause of cesser, is inoperative as against an unmarried woman, and even as against a married woman if the gift is not for her separate use, just as it is void as against a man (*a*). So that a clause against anticipation, unaccompanied by a gift over on such anticipation, annexed to a gift to the separate use of a female for life, does not prevent her from alienating her whole interest, or converting all the property to her own absolute use, before she is married, or after she becomes discovert (*b*). And if the property consists of a sum of money to be invested in the purchase of an annuity, she is entitled before her marriage to have the money paid to her at once, without having it laid out (*c*). **3234.**

Where property is appointed to the separate use of a daughter, with a restraint on anticipation, and she was unborn at the time of the creation of the power, the appointment itself is good, but the restraint on anticipation is void, as being contrary to the rule against perpetuities (*d*). **3235.**

(*a*) 2 Spence's Eq. Jur. 511, 520—522; Story's Eq. Jur. § 1382 a, 1884; 1 Rep. Leg. by White, 794; 11 Jarm. & Byth. by Sweet, 473; 2 Jarm. Wills, 2nd ed. 30; *Barton v. Briscoe*, Jac. 603; *Tullett v. Armstrong*, 1 Beav. 1; 4 My. & Cr. 377; *Baggett v. Meux*, 1 Coll. 138; 1 Phil. 628; *Re Young's Settlement*, 18 Beav. 199; *Wright v. Wright*, 2 Johns. & Hem. 647; *In re Ellis's*

*Trusts*, L. R. 17 Eq. 409.

(*b*) *Brown v. Pocock*, 2 Russ. & My. 210, overruling the decision of Sir *J. Leach*, 2 My. & K. 189; *Wright v. Wright*, 2 Johns. & Hem. 647.

(*c*) *Woodmeston v. Walker*, 2 Russ. & My. 197.

(*d*) *In re Teague's Settlement*, L. R. 10 Eq. 564; *In re Cunynghame's Settlement*, L. R. 11 Eq. 324.

PT. IV. T. 1,  
CH. 8, §. 5.

The words "independent of her husband" mean no more than that equity will not permit the marital power of the husband to be used in contravention of the enjoyment of the property according to the terms of the gift. If there is no restraint on alienation of the separate estate, she has an alienable estate; and though it is legally enjoyable independent of her husband in the sense above mentioned, yet it is virtually liable to be destroyed by the influence and control of the husband, in inducing the wife to exercise the power of alienation thus incident to her separate estate. But if the limitation of a separate estate is accompanied with a prohibition of alienation or anticipation, she has an inalienable estate during the coverture existing at the time when the gift was made, or, if she was then discoverd, during the coverture following the gift; and if the words are general and unrestricted to any particular coverture, during every subsequent coverture (*a*). Also the fetter of restraint on anticipation or alienation applies to a bequest of a sum of money or its equivalent as much as to real estate or a fund producing income (*b*).  
**3236.**

Where a sum of money was vested in trustees, upon trust to pay the income to such persons as a married woman should appoint, but not so as to dispose of the same in the way of anticipation, and in default of such appointment into her own hands, for her own separate use, notwithstanding her coverture, independent of her husband (naming him), etc., the allusion to her present husband did not restrict the generality of the first part of the provision, so as to confine the restraint on anticipation to the existing coverture (*c*). But in the case of a devise

(*a*) 2 Spence's Eq. Jur. 524; *Tullett v. Armstrong*, 1 Beav. 1; 4 My. & Cr. 337; *Baggett v. Meux*, 1 Coll. 138; 1 Phil. 627; *Clark v. Jacques*, 1 Beav. 36; *Dixon v. Dixon*, Ib. 40;

*Jones v. Salter*, 2 Russ. & My. 208.

(*b*) *In re Croughton's Trusts*, L. R. 8 Ch. D. 460.

(*c*) *In re Gaffee's Settlement*, 1 Mac. & Gord. 541.

or bequest to a married woman, independent of her husband (naming him), for her separate use, or for her separate use independent of him, the limitation to her separate use is restricted to her present coverture (*a*). **3237.**

Pr. IV. T. 1,  
Ch. 3, s. 5.

Restrictions against alienation or anticipation will not be inferred from any ambiguous expressions. They must either be contained in express words, or be deducible by plain implication (*b*). Hence the mere circumstance of the interest being directed to be paid from time to time will not prevent the wife from making a sweeping appointment at once (*c*). And a woman is not restrained from the power of alienating her life interest, because it is given to her sole and separate use, and is to be paid into her own proper hands and upon her receipt alone; such expressions being intended only to exclude the marital claims of any present or after-taken husband, and not to control that right of disposition which is incident to property (*d*). But it has been held on appeal, that where a testator gives property upon trust to pay the rents, etc., unto such person or persons, for such intents and purposes, and in such manner as a married woman by any writing or writings, under her hand, when and as the same shall become due, but not by way of assignment, charge, or other anticipation thereof, shall, notwithstanding her present or any future coverture, direct or appoint, and in default of any such direction or appointment, or, so far as the same, if incomplete, shall not extend, into her proper hands, for her sole and separate use, etc., for which purpose her receipts in writing shall, notwithstanding any such coverture be good discharges; there the restrictive clause "but not by way of assignment, charge, or other anticipation there-

(*a*). *Moore v. Morris*, 4 Drewry 33.

(*b*) See 2 Spence's Eq. Jur. 512, 522; 2 Jarm. Wills, 2nd ed. 21.

(*c*) 1 Sugd. Pow. 207; 2 Jarm.

Wills, 2nd ed. 21; and remarks of V.-C. *Kindersley*, in *Moore v. Morris*, 4 Drewry 37.

(*d*) 1 Sugd. Pow. 210; 2 Jarm. Wills, 2nd ed. 21.

Pr. IV. T. 1,  
CH. 3, s. 5.

of," extends to the whole gift, and applies as well to any disposition made as incidental to the separate estate which she is to take in default of appointment, as to any appointment made in execution of the power. For she is not allowed to direct the payment or application of the rents, etc., by way of assignment, charge, or other anticipation; and therefore she could not make any disposition, as incidental to her separate estate, to take effect as an assignment, charge, or other anticipation, because that would operate as a direction (a). And where trustees are directed to receive the income of settled property, when and as often as the same shall become due, and to pay the same to her or to such persons as she shall appoint, or to permit her to receive it for her separate use, so and in such manner that her receipts alone, or the receipts of any person to whom she may appoint the income after it shall become due, shall be a valid discharge, the femme is restrained from anticipating the income (b). 3238.

[The restraint on anticipation cannot be evaded by any device whatever. Formerly a Court had no power to release the property of a married woman from the effects of such a restraint, even where she fraudulently concealed its existence and joined in a mortgage of her separate estate, or even with her consent, and for her manifest advantage, as in the case of a gift to her of a legacy of considerable amount on condition that she convey away separate property of small value (c). But with respect to judgments or orders made after the 31st of December, 1881, the law is now altered. For it is enacted by stat. 44 & 45 Vict. c. 41, s. 39 (Appendix), that "notwithstanding that a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears

Stat. 44 & 45  
Vict. c. 41,  
s. 39.  
The Convey-  
ancing and  
Law of

(a) *Brown v. Bamford*, 1 Phil. 629, reversing decision of V.-C. E., 11 Sim. 127.

(b) *Field v. Erans*, 15 Sim. 375; *Baker v. Bradley*, 7 D. M. & G. 597,

overruling the decision of the Court below; 2 Sm. & Gif. 555—6, 560—3.

(c) *Robinson v. Wheelwright*. 21 Beav. 214; 6 D. M. & G. 535; *Stanley v. Stanley*, L. R. 7 Ch. D. 589.

[to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property." **3239.**

PT. IV. T. 1,  
CH. 3, s. 5.

Property  
Act, 1881.

Existing and future settlements, and restrictions against anticipation, are expressly provided for by stat. 45 & 46 Vict. c. 75 (Appendix), which enacts by s. 19, "Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors." **3239a.**

A direction to settle an estate upon a woman for life, without power of anticipation, implies that such life estate is not to be without impeachment of waste (*a*). **3239b.**

IV. Where the wife bestows her separate property upon her husband, Courts of Equity examine the transaction with an anxious dread of undue marital influence; and if they are required to give sanction or effect to it, they will examine the wife in Court, and adopt other precautions to ascertain her unbiassed wishes (*b*). **3240.**

IV. Gifts to  
the husband  
by the wife.

Where, however, the husband, with the consent of the wife, is in the habit of receiving the income of her separate

Husband's  
receipt of  
the income.

(*a*) *Clive v. Clive*, L. R. 7 Ch. Ap. 433.

(*b*) *Story's Eq. Jur.* § 1395; 2 *Spence's Eq. Jur.* 514.

PR. IV. T. 1,  
CH. 3, S. 5.

estate, it is regarded as showing her voluntary choice thus to dispose of it for the benefit of the family (a). 3241.

Separate money of the wife, paid to the husband or placed to his account by her authority or with her concurrence, cannot be recalled, whether it exists unapplied and capable of being earmarked, or not (b). And the income of separate estate, where the wife is of unsound mind, is payable to the husband for her support, if he is unable to maintain her (c). But, upon principle, it clearly ought to be held to be payable to him, even if he is able to maintain her. The opposite doctrine is simply monstrous. 3242.

V. Right of husband to wife's separate property on her death, independently of any gift.

V. Where a married woman is possessed of money arising from personal property settled to her separate use, she may dispose of it either by deed or by will; but if she makes no disposition of it, it will, on her decease, belong to her husband in his marital right, without taking out administration (d). And where it is stipulated in marriage articles, that the intended wife's property shall be for her separate use to all intents and purposes as if she were sole and unmarried; in such case, on her death without issue, and without having made any appointment of the property, the husband is entitled to it as her administrator, and not her next of kin (e). 3243.

VI. Liability of separate estate.

VI. [According to the law in cases unaffected by the stat. 45 & 46 Vict. c. 75 (Appendix), a married woman, except] under the stat. 20 & 21 Vict. c. 85, s. 26 (f), which relates to women judicially separated, cannot render herself or her property liable at law, for any contract, debt, or charge created by her during the coverture, not even for necessities. But a married woman having separate estate (except so far as she is restrained from anticipation), being

(a) Story's Eq. Jur. § 1396; see 2 Spence's Eq. Jur. 514; 1 Lead. Cas. Eq. 2nd ed. 411.

(b) *Caton v. Ridout*, 1 Mac. & Gord. 603; *Gardner v. Gardner*, 1 Gif. 126.

(c) 2 Spence's Eq. Jur. 525.

(d) *Molony v. Kennedy*, 10 Sim. 254; see also *Tugman v. Hopkins*, 4 M. & Gr. 389; 5 Scott, N. R. 464.

(e) *Proudley v. Fielder*, 2 My. & K. 57.

(f) See *supra*, par. 3186.

considered in equity as a femme sole, as regards the separate estate, with respect to the capacity of enjoying it, she is likewise considered as a femme sole, with respect to the capacity of charging the estate with debts or engagements. No personal decree, however, can be made against her: the Court can only affect her separate estate in the hands of her trustees: she cannot bind her person at all, or her property generally, but only her separate property, on which no restraint on anticipation has been imposed (a). And in order that a creditor may obtain payment out of her personal estate, he must join as defendants her husband and the trustees of her settlement (b). Her separate property will be held liable for all debts, charges, and incumbrances which she expressly charges, or which, judging from the nature thereof, it may be fairly inferred that she intended, or which she ought to be deemed to have intended, to charge on her separate estate, and for her breaches of trust, except so far as she is prevented by being restrained from anticipation (c). And if an obligation is binding on her separate estate, it extends not only to that which she has at the time of the contract, but to that which she may in any way acquire, and may have at the time the judgment is recovered (d). And hence, if she gives a promissory note, or an acceptance, or a bond to pay her own debt, or if she joins in a bond with her husband to pay his debts, without reference to her separate estate, it will be intended as an application pro tanto of her separate estate; because

PT. IV. T. 1,  
CH. 3, S. 5.

(a) Story's Eq. Jur. § 1397, and note, and 1400, note; 2 Spence's Eq. Jur. 324, 325, 504, 515—518; see remarks of *Kindersley*, V.-C., in *Vaughan v. Vanderstegen*, 2 Drewry 179—184; *Blatchford v. Woolley*, 2 Dr. & Sm. 204.

(b) *Atwood v. Chichester*, L. R. 3 Q. B. D. (Ap.) 722.

(c) *Clive v. Carew*, 1 Johns. & Hem. 199. And see *Johnson v.*

*Gallagher*, 3 D. F. & J. 494; *In re Leeds Banking Co.*, L. R. 3 Eq. 781; *Picard v. Hine*, L. R. 5 Ch. Ap. 274; *McHenry v. Davies*, L. R. 10 Eq. 88; *London Chartered Bank of Australia v. Lemprière*, L. R. 4 P. C. 572; *Mayd v. Field*, L. R. 3 Ch. D. 587.

(d) *Johnson v. Gallagher*, 3 D. F. & J. 494; *Pike v. Fitzgibbon*, L. R. 14 Ch. D. 837; *Flower v. Buller*, L. R. 15 Ch. D. 665.

PT. IV. T. 1,  
CH. 3, S. 5.

the security must have been executed with the intention that it should operate in some way, and it can have no operation except as against her separate estate. And if she employs a lawyer upon her own responsibility, or an agent to raise money on the credit of her name, her separate estate will be liable, from the nature of the engagement. But it would seem that her separate estate would not be liable for debts of an ordinary character, for which she gives no security, unless, at least, she is divorced or judicially separated. Before the creditor has established his right against the separate estate he cannot restrain the married woman from dealing with it any more than he can restrain a man from dealing with his property before he has obtained a judgment or a charge upon it (*a*). And in no case would the Court charge the corpus of the separate estate in respect of her general obligations (*b*). **3244.**

Stat. 45 & 46  
Vict. c. 75.  
The Married  
Women's  
Property  
Act, 1882.

[But the liability of married women with respect to their separate property is greatly extended by stat. 45 & 46 Vict. c. 75 (Appendix), which, after providing that a married woman shall, in accordance with its provisions, be capable of holding any real and personal property, as her separate property as if she were a femme sole, without the intervention of any trustee, enacts by s. 1, "(2) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a femme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs

(*a*) *Robinson v. Pickering*, L. R. 16 Ch. D. (Ap.) 660.

(*b*) See Story's Eq. Jur. § 1391—1401, and notes; 2 Spence's Eq. Jur. 515, 516, and notes; *McHenry v.*

*Davies*, L. R. 10 Eq. 88; *London Chartered Bank of Australia v. Lemprière*, L. R. 4 P. C. 572; *Davies v. Jenkins*, L. R. 6 Ch. D. 728.



recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise. (3) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property unless the contrary be shown. (4) Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire. (5) Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a femme sole." ] **324a.**

PT. IV. T. 1,  
CH. 3, S. 5.

It has been held that the separate estate is not liable for the breaches of trust or other torts of the married woman unconnected with such separate estate. But this decision (to say the least) is very questionable (a). [And now stat. 45 & 46 Vict. c. 75 (Appendix), after providing that a married woman who is an executrix, or administratrix, or trustee either alone, or jointly with any other person or persons, may sue and be sued, and may transfer or join in transferring certain annuities and deposits, and also stocks, funds, shares, and other interests, without her husband, as if she were a femme sole (s. 18); enacts by s. 24 that "the word 'contract' in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee, or executrix, or administratrix, either before or after her marriage, and her husband shall

Stat. 45 & 46  
Vict. c. 75.  
The Married  
Women's  
Property  
Act, 1882.

(a) *Wainford v. Heyl*, L. R. 20 Eq. 321.

PT. IV. T. 1,  
CH. 3, S. 5.

not be subject to such liabilities unless he has acted or intermeddled in the trust or administration."'] **3245.**

A woman's separate estate is liable, after her husband's bankruptcy, to debts incurred by her before her marriage (a). **3246.**

Unless contrary to the deed of settlement of the company, a married woman may be a shareholder in a joint-stock company in her own right, so as to bind her separate estate (b). **3247.**

It was held that where she has a life interest to her separate use, with a general power of appointment by will over the remainder, she does not, by exercising the power, make the remainder applicable to the discharge of such engagements as would bind her separate property, unless she has been guilty of fraud (c). But according to other authorities, in such an instance the appointed property is liable to the appointor's debts, as if it were separate estate (d). [And this view is confirmed by stat. 45 & 46 Vict. c. 75 (Appendix), which enacts by s. 4, that "the execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act."'] **3248.**

Where personal property is vested in a woman for her separate use (without any restraint on anticipation), with remainder, as she should by deed or will appoint; with remainder to her executors or administrators; this is equivalent to an absolute gift to her sole and separate use (e). **3249.**

(a) *Chubb v. Stretch*, L. R. 9 Eq. 555.

(b) *In re Leeds Banking Co.*, L. R. 3 Eq. 781.

(c) *Vaughan v. Vanderstegen*, 2 Drewry 165, 363; *Hobday v. Peters* (No. 2), 28 Beav. 354; *Blatchford v. Woolley*, 2 Dr. & Sm. 204; *Shattock v. Shattock*, L. R. 2 Eq. 182.

(d) See remarks of James, L. J., in *London Chartered Bank of Australia v. Lemprière*, L. R. 4 P. C. 572, 594, 596; *In re Harvey's Estate*, *Godfrey v. Harben*, L. R. 13 Ch. D. 216.

(e) *London Chartered Bank of Australia v. Lemprière*, L. R. 4 P. C. 572, 595—6.

As regards liabilities incurred by women before marriage, the law seems now to stand thus: 1. In the case of women married before the passing of the stat. 33 & 34 Vict. c. 93, August 9, 1870, the husband is liable, by the common law, for debts contracted by his wife before marriage. 2. In the case of women married since August 9, 1870, and before the passing of the stat. 37 & 38 Vict. c. 50, July 30, 1874, the husband is not liable for such debts, but the wife is liable. And this liability extends even to property settled to her separate use, without power of anticipation (*a*). 3. In the case of women married since July 30, 1874, the husband is liable, if jointly sued, for debts contracted by his wife before marriage, or for damages for any tort committed by her before marriage, or for the breach of any contract made by her before marriage, in respect and to the extent of certain specified property of the wife, or by reason and to the extent of a confession of liability by the husband, or (to the extent of the property of the wife) by reason of his not pleading exemption from liability. And the wife is liable jointly, so far as he is sued with her and is liable. And she is liable separately, so far as she is sued separately, or so far as he is not liable, if they are sued jointly. [This liability is confirmed by the stat. 45 & 46 Vict. c. 75 (*b*), and by that statute sums for which a wife may be liable as contributory are expressly included in the liability, from which such sums had been excluded (*c*). That statute also repeals the Acts mentioned in the preceding part of this paragraph.] **3250.**

Where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices may make an order against her for the maintenance of her husband (*d*). **3251.**

Pt. IV. T. 1,  
CH. 3, s. 5.

Liability on  
wife's con-  
tracts before  
marriage.

Married  
woman to be  
liable to the  
parish for  
the main-  
tenance of  
her hus-  
band.

(*a*) *Sanger v. Sanger*, L. R. 11 Eq. 470.

*West of England Bank*, L. R. 12 Ch. D. 284.

(*b*) See ss. 13—15, in Appendix.

(*d*) See stat. 45 & 46 Vict. c. 75,

(*c*) *Ex parte Hatcher*, *In re*

s. 20, in Appendix.

Pr. IV. T. 1,  
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Married  
woman to  
be liable to  
the parish  
for the  
main-  
tenance of her  
children.

The repealed stat. 33 & 34 Vict. c. 93 enacted that  
“A married woman having separate property shall be  
subject to all such liability for the maintenance of her  
children as a widow is now by law subject to for the  
maintenance of her children: Provided always, that  
nothing in this Act shall relieve her husband from any  
liability at present imposed upon him by law to maintain  
her children” (s. 14). [The liability under this section  
was held not to apply to grandchildren (*a*), but by stat.  
45 & 46 Vict. c. 75, s. 21 (Appendix), this provision is  
re-enacted and extended to include the maintenance of  
grandchildren, and the words “the husband” are sub-  
stituted for “a widow” in the above section.] **3252.**

VII. Effect  
of a covenant  
to settle pro-  
perty, or a  
marriage  
settlement  
on after-  
acquired  
separate  
estate.

VII. A covenant by an intended husband alone, to settle  
any property to which his intended wife or he in her right  
might become entitled during the coverture, will not affect  
property subsequently given to her separate use (*b*). And  
although an ante-nuptial settlement purports to give the  
husband a life interest in all property which the wife  
might acquire during the coverture, yet the husband will  
take no interest in property afterwards given for her  
separate use (*c*). **3253.**

[A covenant or agreement by husband and wife to  
settle after acquired property of the wife, may be so  
worded as to bind such property given for her separate  
use. But this depends upon the wording of the settle-  
ment, and the circumstances of each case (*d*).] **3253a.**

(*a*) *Coleman v. Birmingham Overseers*, L. R. 6 Q. B. D. 615.

(*b*) *Travers v. Travers*, 2 Beav. 179; *Grey v. Stuart*, 2 Gif. 398.

(*c*) *Duncan v. Cannan*, 21 Beav. 307.

(*d*) *Butcher v. Butcher*, 14 Beav.

222; *Willoughby v. Middleton*, 2 J. & H. 344; *Coventry v. Coventry*, 32 Beav. 612; *In re Mainwaring's Settlement*, L. R. 2 Eq. 487; *Campbell v. Bainbridge*, L. R. 6 Eq. 269; *Kane v. Kane*, L. R. 16 Ch. D. 207; *Hilbers v. Parkinson*, 32 W. R. 315; L. R. 25 Ch. D. 200.

## SECTION VI.

*The Wife's Equity to a Settlement or Maintenance out of her own Property (a).*

I. Trustees of a married woman's personalty, not settled to her separate use, may pay it over to her husband before proceedings in equity are taken in respect of it. But, on the other hand, they may refuse to pay it over to him, even at his wife's request, unless he make a settlement, where the Court would require him to make one (b). **3254.**

PR. IV. T. 1,  
CH. 3, s. 6.

I. Power of trustees of the wife's personalty not settled to her separate use.

With regard to cases where the Court requires a settlement, if the wife has real property, or personal property, which cannot be reduced into the husband's possession without proceedings in equity (as where the legal property is vested in trustees), and the husband applies to a Court of Equity for the purpose of reducing the property into his possession; the Court, acting upon the maxim that he who seeks equity must do equity, will not give it up to him, without requiring him to make a suitable settlement of a part of the property, or of some other property, for the due maintenance of his wife in case of her surviving him (c), with a provision for the issue of marriage (d), even though the property is under £200 (e), unless the wife and children are already amply provided for under a prior settlement (f), or the right to a settlement is waived or lost (g). In the absence of a contract to that effect, an inadequate settlement, even before marriage, of a part of the wife's property does not deprive her of her right to a settlement out of the residue of her property,

Equity of the wife, when defendant, against her husband.

(a) See *Gleaves v. Paine*, 1 D. J. & S. 87.

(b) Hill on Trustees, 409, 410, 415; *Re Swan*, 2 Hem. & Mil. 34.

(c) Story's Eq. Jur. § 1404, 1405, 1410, 1418; 2 Spence's Eq. Jur. 482, 484. See *Life Assoc. of Scotl. v. Siddall*, 3 D. F. & J. 271.

(d) Story's Eq. Jur. § 1406; 2

Spence's Eq. Jur. 488.

(e) *In re Cutler*, 14 Beav. 220; *Re Kincaid's Trust*, 1 Drewry 326.

(f) Story's Eq. Jur. § 1416; *Spicer v. Spicer*, 24 Beav. 365; *Giacometti v. Prodgers*, L. R. 14 Eq. 252; 8 Ch. Ap. 338.

(g) Story's Eq. Jur. § 1418, 1419; *infra*, par. 3268—9.

PT. IV. T. 1, though vested in her at the time of the marriage (a).  
CH. 3, s. 6.

**3255.**

Where husband and wife take as tenants by entreties, the whole is subject to the husband's debts, and the wife has no equity to a settlement out of it (b). **3255a.**

The equity of the wife exists in the case of a charge on land for her benefit, even though there be a power of entry and receipt of the rents and profits (c). **3256.**

Refusal of  
the husband  
to make a  
settlement.

If the husband does not choose to make a settlement or provision for the wife, the Court will not ordinarily take from him the income and interest of his wife's fortune, so long as he is willing to live with and maintain her, and there is no reason for their living apart. Under such circumstances, the Court secures the fund, so as to give her the chance of taking it by survivorship, allowing the husband, under its order, to receive the income and interest, or a part of it at least (d). **3257.**

Indebted-  
ness of wife  
on marriage.

Where a woman is indebted at the time of her marriage, she has no equity to a settlement until her debts are provided for (e). **3258.**

II. Equity  
of the wife,  
when de-  
fendant, as  
against her  
husband's  
assignees.

II. The trustees in bankruptcy or insolvency of a husband, and also his assignees for payment of debts due to his creditors generally, are bound to make a settlement on the wife out of her immediate choses in action, and immediate, absolute, equitable interests in chattels personal assigned to them, in the same way, and under the same circumstances, as he would be bound to make one; for it is a general principle that such trustees take the property subject to all the equities which affect the bankrupt or insolvent or general assignor. Such trustees also

(a) *Barrow v. Barrow*, 18 Beav. 529.

(b) *Ward v. Ward*, L. R. 14 Ch. D. 506; *In re Bryan, Godfrey v. Bryan*, L. R. 14 Ch. D. 516.

(c) *Duncombe v. Greenacre*, 28

Beav. 472; 2 D. F. & J. 509.

(d) Story's Eq. Jur. § 1415; see 2 Spence's Eq. Jur. 490, 491.

(e) *Barnard v. Ford*, L. R. 4 Ch. Ap. 247.

take the property subject to the wife's right of survivorship, in case the husband dies before the trustees have reduced her choses in action and equitable interests into possession (a). And even a specific assignee or purchaser from the husband, for valuable consideration, of her choses in action and equitable interests, is bound to make such a settlement. And no assignment of them will convey any right to the assignee or purchaser against the wife, if she survives her husband, and they are not reduced into possession in his lifetime (b). **3259.**

Pt. IV. T. 1,  
CH. 3, S. 6.

There is this distinction, however, between the case of the husband himself and his specific assignees for valuable consideration on the one hand, and the case of his trustees in bankruptcy or insolvency, or assignees for payment of debts generally, on the other hand, that in the case of the former, it is only necessary that the provision for the wife should commence from the death of her husband: whereas in the case of the latter, it is necessary that the provision should commence immediately, because the general assignment of his property renders him incapable for a time, and perhaps for ever, of affording her a suitable support (c). **3260.**

When an immediate provision is required.

If the trustees in bankruptcy, or other general assignees claiming title under the husband, refuse to make a settlement on the wife, the like doctrine applies to them, as to the husband himself, when he refused to make a settlement (d). **3261.**

Refusal of the assignees to make a settlement

The husband can sell the life interest of his wife in personalty, and she has no equity to a settlement as against the purchaser (e). **3262.**

Life interest in wife's personalty.

A wife has no equity to a settlement out of arrears of No equity

(a) Story's Eq. Jur. § 1411, 1421 ;  
2 Spence's Eq. Jur. 476.

*Prole v. Soady*, L. R. 3 Ch. Ap. 220.

(c) Story's Eq. Jur. § 1421.

(b) Story's Eq. Jur. § 1412 ; 2  
Spence's Eq. Jur. 476 ; *Scott v.*  
*Spashett*, 3 Mac. & Gord. 604 ;

(d) Story's Eq. Jur. § 1415 ;  
*supra*, par. 3257.

(e) *Re Duffy's Trust*, 28 Beav. 386.

Pr. IV. T. 1,  
CH. 3, s. 6.

out of  
arrears of  
past income.

III. Equity  
of the wife,  
when plain-  
tiff or peti-  
tioner, to a  
settlement  
on her hus-  
band's  
death, bank-  
ruptcy, or  
insolvency.

IV. Amount  
to be settled.

past income of real or personal property as against the husband or his particular assignee (*a*). 3263.

III. Whenever the wife, as defendant, would be entitled to an equity for a settlement, out of her equitable interest, against her husband or against his assignees, she may assert it, as plaintiff or petitioner (*b*). 3264.

IV. The Court has a full discretion as to the amount to be settled, according to the circumstances of each case (*c*). In the absence of special circumstances, however, the general rule or the common course has been to settle about one-half on the wife and her children (*d*). But where particular reasons have occurred, the Court has frequently settled the whole: as in *Marshall v. Fowler* (*e*), where the husband had taken the benefit of the Insolvent Debtors' Act, and was moreover almost entirely dependent on charity; *In re Kincaid's Trust* (*f*), and *Ward v. Yates* (*g*), where the husband was a bankrupt, and the fund was under £200—so small a sum that it would not have been worth while to have made any settlement at all, unless the whole had been settled; *In re Cutler* (*h*), and in *Watson v. Marshall* (*i*), and in *Francis v. Brooking* (*j*), *Koeber v. Sturgis* (*k*), *Squires v. Ashford* (*l*), *Duncombe v. Greenacre* (*m*), where the husband was an insolvent debtor; in *Scott v. Spashett* (*n*), where, besides other special circumstances, the husband had received about

(*a*) *In re Carr's Trusts*, L. R. 12 Eq. 609.

(*b*) Story's Eq. Jur. § 1414; 2 Spence's Eq. Jur. 482, 484, 485; *Walker v. Drury*, 17 Beav. 482; *Gleaves v. Paine*, 1 D. J. & S. 87; *Re Ford*, 32 Beav. 621.

(*c*) *Walker v. Drury*, 17 Beav. 482; *Smith v. Smith*, 3 Gif. 121.

(*d*) *Napier v. Napier*, 1 Dru. & W. 410; *Bagshaw v. Winter*, 5 De G. & Sm. 466; *M'Cormick v. Garnett*, 2 Sm. & G. 37; 5 D. M. & G. 278; *Re Grove's Trusts*, 3 Gif. 583;

2 Spence's Eq. Jur. 485; 1 Bright Husb. and Wife, 241; *Spirett v. Willows*, L. R. 1 Ch. Ap. 520.

(*e*) 16 Beav. 249.

(*f*) 1 Drew. 326.

(*g*) 1 Drew. & Sm. 80.

(*h*) 14 Beav. 220.

(*i*) 1 W. R. 523.

(*j*) 19 Beav. 347.

(*k*) 22 Beav. 588.

(*l*) 23 Beav. 132.

(*m*) 28 Beav. 472; 29 Beav. 578; *Newman v. Wilson*, 31 Beav. 34.

(*n*) 3 Mac. & Gord. 599.



double the amount of the wife's property under a previous order, and no settlement had ever been made; in *Dunkley v. Dunkley* (a), *Vaughan v. Buck* (b), and *Gent v. Harris* (c), where the husband had become bankrupt, and had deserted his wife; and *In re Welchman* (d), where the husband was a bankrupt, and had no means of maintaining his wife and child. **3265.**

Pr. IV. T. 1,  
Ch. 3, s. 6.

V. Where a settlement is made to give effect to a wife's equity to a settlement, there, in the absence of special circumstances, the limitations (after a life estate to herself, and in default of her issue by the present or any future husband, who should attain a vested interest) ought not to be upon such trusts as the wife should appoint, and, for want of appointment, for her next of kin, but to the husband, whether he survives the wife or not, or his assignees. For the husband's right is only subject to the equity of the wife herself and her issue (e). **3266.**

V. Limita-  
tions of the  
settlement.

VI. To avoid the expense of a settlement, where the fund allowed to the wife is small, it will sometimes be ordered to be brought into Court, or if already in Court, it will be retained there, and the dividends directed to be paid to the wife for her life (f). **3267.**

VI. Substi-  
tute for a  
settlement  
where fund  
is small.

VII. The Court will not insist on a settlement on the wife, if, at any time before a settlement under the decree is completed, or at least before proposals are made under the decree, the wife, by her consent, given in open Court or under a commission, agrees that the absolute fund shall be wholly and absolutely paid over to her husband, except in the case of a female ward of the Court who has

VII. Wife's  
equity  
waived;

(a) 4 De G. & S. 570; 2 D. M. & G. 390.

(b) 1 Sim. (N. S.) 284.

(c) 10 Hare 383.

(d) 1 Gif. 31.

(e) *Curter v. Taggart*, 1 D. & M. 286; *Spirett v. Willows*, L. R. 1 Ch. Ap. 520; 4 Ch. Ap. 407; *In re*

*Suggitt's Trusts*, L. R. 3 Ch. Ap. 215; *Croxtan v. May*, 9 Eq. 404; *Walsh v. Mason*, L. R. 8 Ch. Ap. 482.

(f) *Bagshaw v. Winter*, 5 De G. & Sm. 466; *Watson v. Marshall*, 17 Beav. 363; *Walker v. Drury*, 17 Beav. 482.

PT. IV. T. 1,  
CH. 3, s. 6.

married without its authority (a). But until the transfer to the husband has actually been made, the wife can revoke her consent (b). **3268.**

or lost, or  
suspended.

The equity of the wife to a settlement may be lost or suspended by her own misconduct. Thus, if the wife (not being a ward of Court married without its consent) is living in adultery, apart from the husband, a Court of Equity will not direct a settlement, on her own application, as it otherwise would; because, by such misconduct, she has rendered herself unworthy of the protection and favour of the Court. On the other hand, in such a case, a Court of Equity will not decree such equitable property to be paid over to the husband, on his application; for when the wife is living apart from him, he is at no charge for her maintenance; and it is only in respect to his duty to maintain her, that the law gives him her fortune. And in the case of a female ward of Court married without its consent, the Court will insist on a settlement, as a punishment to the husband for contempt of its authority (c). **3269.**

We must, however, be careful to distinguish an application which is grounded merely on general principles of equity, and an application grounded on positive vested rights under a settlement or under a valid contract for a settlement made before marriage. In the latter case, Courts of Equity cannot refuse to protect or support those vested rights, on account of any misconduct in the wife (d). A woman may, by her fraud, even though perpetrated under her husband's compulsion, preclude herself from asserting against a purchaser that equity to a settlement which she would otherwise possess (e). **3270.**

(a) Story's Eq. Jur. § 1418; 2 Spence's Eq. Jur. 486, 488.

(b) *Penfold v. Mould*, L. R. 4 Eq. 562.

(c) Story's Eq. Jur. § 1419, and

note, and 1419 a; 2 Spence's Eq. Jur. 486.

(d) Story's Eq. Jur. § 1420.

(e) *In re Lusk's Trusts*, L. R. 4 Ch. Ap. 591.

Where an executor is indebted to the testator's estate, and unable to pay, he is not entitled to any part of the assets in right of his wife, and consequently no equity to a settlement of any part of the assets can arise to the wife (*a*). **3271.**

Pr. IV. T. 1,  
Ch. 3, s. 6.

We have seen that the Court, in making a settlement on the wife, properly attends to the interests of the children. But it must be observed, that the Court attends to their interest only upon the supposition, that, in so doing, it is carrying into effect her own desire to provide for her offspring. They have no independent equity of their own; for although the husband is under a moral obligation to provide for them, yet he is not bound to provide for them in any particular way or out of any particular fund. They have only a claim to the consideration of the Court constituting part of the equity of their mother, and capable of being either expressly given up by her before the amount is ascertained, or tacitly waived by her dying without having asserted it (*b*). And it has been held that if she dies before decree, even without waiving the right to a settlement, the children cannot enforce their claim (*c*). **3272.**

Waiver of  
provision  
for the  
children.

By the law of Scotland, a married woman has no equity to a settlement; and if husband and wife are domiciled in Scotland, she has no equity to a settlement (*d*), even out of the produce of real estate in England directed to be sold (*e*). But still, if she is a ward of Court, the Court, before parting with her funds to her husband, will take care that a proper provision is made for her, unless the property is small, and it does not seem expedient that a settlement should be made (*f*). **3273.**

No equity to  
a settlement  
where  
parties are  
domiciled  
in Scotland.

(*a*) *Knight v. Knight*, L. R. 18 Eq. 487.

(*d*) *M' Cormick v. Garnett*, 5 D. M. & G. 278.

(*b*) See Story's Eq. Jur. § 1417; 2 Spence's Eq. Jur. 488—492.

(*e*) *Hitchcoc v. Clandinen*, 12 Beav. 534.

(*c*) *Wallace v. Auldjo*, 2 Dr. & Sm. 216; 1 D. J. & S. 643.

(*f*) *In re Tweedale's Settlement*, 1 Johns. 109.

Pr. IV. T. 1,  
Ch. 3, s. 6.

VIII. Equity  
of the wife  
to a mainte-  
nance, in  
case of the  
husband's  
misconduct,  
or bank-  
ruptcy, or  
insolvency.

VIII. Although Courts of Equity do not claim any general jurisdiction to decree a suitable maintenance for the wife out of her husband's property, when he has deserted or ill-treated her, yet, whenever the wife has an equitable property, even though it be only for her life, within the reach of the jurisdiction of Courts of Equity, and the husband has deserted, or ill-treated, or refused to maintain her, they will decree a suitable and immediate maintenance out of such equitable property, or, if it has passed into the possession of a bonâ fide purchaser without notice, out of other property of the husband; because the obligation of maintaining the wife is the ground on which the law gives her property to the husband (*a*). And where the wife has an equitable interest for life only, and the husband is a bankrupt or insolvent, and therefore, as a general rule, is deprived, for a time at least, of the means of duly maintaining her, she is entitled to an allowance for maintenance out of such life interest, as against the trustees (*b*). But a married woman, even though her husband does not maintain her, is not entitled, as against a particular assignee for a valuable consideration of the husband, to an allowance for maintenance out of the income of real or personal estate to which she is entitled in equity for her life only; because, if she were, purchasers would be involved in inquiries respecting the relations between husband and wife, and their other property and sources of maintenance; and the life interests of married women would become incapable of being dealt with, whatever might be the exigencies of the case (*c*). **3274.**

[In cases affected by the provisions of stat. 45 & 46 Vict. c. 75 (Appendix), this section must be read subject to the modifications in the law relating to the property

(*a*) Story's Eq. Jur. § 1408, 1422, note.  
1424, 1426, 1408, note.

(*b*) Story's Eq. Jur. § 1412, 1408,

(*c*) *Tidd v. Lister*, 10 Hare 151,  
153; 3 D. M. & G. 857.

of married women and their position with respect to their <sup>PT. IV. T. 1,  
CH. 3, s. 6.</sup> property, which are introduced by that Act.] **3274a.**

## SECTION VII.

### *Some Points respecting Deeds of Separation.*

Where, in a separation deed, the wife covenants to save <sup>PT. IV. T. 1,  
CH. 3, s. 7.</sup> and keep indemnified the husband against the debts which she had contracted at the time of making the indenture, or which she should thereafter during the separation contract, this covenant includes debts previously contracted by the wife for necessities while living with the husband (*a*). **3275.**

A deed of separation containing no covenant on the part of a trustee to indemnify the husband against the wife's debts, is not void on that account (*b*). And if a deed of separation contains a covenant by the husband to pay an annuity to a trustee for the wife, but no covenant to indemnify the husband against the wife's debts, the husband's covenant may be enforced against him or his executors, but, being voluntary, not against his creditors (*c*). And an agreement by the husband to pay an annuity for his wife is voluntary, notwithstanding an agreement by her to indemnify her husband in respect of debts on account of herself or her child, although she have separate estate, if she is restrained from anticipation (*d*). **3276.**

When a deed of arrangement is entered into between husband and wife, by which, in consideration of the discontinuance of a suit against the husband for a divorce, and of certain proceedings for obtaining a provision for the wife and her children, it is agreed that the wife is to

(*a*) *Summers v. Ball*, 8 M. & W. 596.

(*b*) *Frampton v. Frampton*, 4 Beav. 287.

(*c*) *Clough v. Lambert*, 10 Sim. 174.

(*d*) *Walrond v. Walrond*, 1 Johns. 18.

PT. IV. T. 1,  
CH. 8, S. 7.

have an income independent of her husband, for maintaining an establishment for herself and her children, of which the husband is enabled to partake, and for educating and clothing her children; such a deed is not contrary to the policy of the law, or otherwise void, but is one which a Court of Equity will enforce (*a*). **3277.**

As a deed of separation cannot dissolve the marriage, it does not relieve the wife from any of the ordinary disabilities of coverture (*b*). **3278.**

A deed of separation entered into between the husband and wife alone, without the intervention of a trustee, is utterly void (*c*). **3279.**

A covenant for separation, whether immediate or future, is void. But a Court of Equity may compel parties, in pursuance of articles of separation entered into between them, to execute a formal deed of separation, quantum valeat, unless in the meantime they agree to live together. And it would seem that if a deed for immediate, and not for future, separation contains a covenant by the husband to maintain his wife, and a covenant by the trustees to exonerate him from any debts contracted for her maintenance, such covenant will be enforced so long as the separation lasts; but it will not be enforced for a longer period, even as to past separation (*d*). **3280.**

A contract in a separation deed cannot affect the property of the wife, if not settled to her separate use, or reduced into possession during the coverture (*e*). **3281.**

The Court will enforce a legal and proper covenant in a separation deed, although other covenants in the same deed may be illegal (*f*). **3282.**

The Court will interfere to prevent the doing of any

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| ( <i>a</i> ) <i>Jodrell v. Jodrell</i> , 9 Beav. 45. | <i>Wilson</i> , 1 H. L. Cas. 538; 5 Id. 51,       |
| ( <i>b</i> ) Story's Eq. Jur. § 1428.                | 61, 62.   |
| ( <i>c</i> ) Story's Eq. Jur. § 1428.                | ( <i>e</i> ) 2 Spence's Eq. Jur. 532.             |
| ( <i>d</i> ) Story's Eq. Jur. § 1428; 2              | ( <i>f</i> ) <i>Hamilton v. Hector</i> , L. R. 13 |
| Spence's Eq. Jur. 528; <i>Wilson v.</i>              | Eq. 511.  |

personal acts which would be in violation of or inconsistent with an agreement respecting property, not improper in its nature, entered into on the separation (a). And where by articles of separation it is agreed that the husband shall permit his wife to live separate, and as if unmarried, without any molestation, interference, or annoyance whatever, and that a proper deed shall be executed for effectuating the object of the articles, and containing all such covenants, etc., as should be deemed expedient for that purpose; this justifies the insertion, in the deed, of a covenant that the husband will not compel or endeavour to compel the wife, by judicial proceedings or otherwise, to cohabit or live with him. And such a covenant is enforceable by action or injunction. And similar remarks apply to the opposite case of an agreement by the wife to permit the husband to live separate (b).

PR. IV. T. 1,  
CH. 3, s. 7.

**3283.**

Reconciliation puts an end to a deed of separation, as it must not be permitted to parties to make agreements for themselves to hold good whenever they choose to live separate (c). **3284.**

If a wife induces her husband to execute a deed of separation in contemplation by her of her renewal of an illicit intercourse, the deed is void (d). **3285.**

By the stat. 36 Vict. c. 12, s. 2, "no agreement contained in any separation deed made between the father and mother of an infant or infants shall be held to be invalid, by reason only of its providing that the father of such infant or infants shall give up the custody or control

(a) 2 Spence's Eq. Jur. 532; *Stocker v. Wedderburn*, 3 K. & J. 403; *Hunt v. Hunt*, 31 Beav. 89; *Wilson v. Wilson*, 1 H. L. Cas. 528; 4 D. F. & J. 221; *Gibbs v. Harding*, L. R. 8 Eq. 490; 5 Ch. Ap. 336; *Saunders v. Rodway*, 16 Beav. 702; *Besant v. Wood*, L. R. 12 Ch. D. 605. *Hamilton v. Hector*, L. R. 13 Eq. 511.

(b) *Wilson v. Wilson*, 5 H. L. Cas. 40, 51, 52, 60—3, 71, 72. And (c) 2 Spence's Eq. Jur. 532. see remarks of V.-C. Wood, in (d) *Evans v. Carrington*, 2 D. F. & J. 481.

PT. IV. T. 1,  
CH. 3, S. 7 thereof to the mother: Provided always, that no Court shall enforce any such agreement if the Court shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto " (a). **3286.**

[This section must be read subject to the changes made by stat. 45 & 46 Vict. c. 75 (Appendix), in the law regulating the property of married women, and their status with reference to their property, in cases coming within the scope of that Act.] **3286a.**

## SECTION VIII.

### *Some Miscellaneous Points.*

PT. IV. T. 1,  
CH. 3, S. 8.

Advance-  
ment.

A power of advancement will not justify trustees in advancing the share of a married daughter for the purpose of paying her husband's debts (b). **3287.**

Revocation  
of a settle-  
ment.

Where a lady's fortune, by the advice of her friends, has been settled upon trust for her, "her executors, administrators, and assigns," until the marriage, and afterwards for her husband and children, the intended husband and wife cannot revoke the settlement without consulting her friends, so as to entitle him after the marriage to the fund so settled (c). **3288.**

Barring the  
wife's share  
of person-  
alty.

A woman may be barred, by the express words of her settlement, of her share of the personal estate of her husband under the Statute of Distributions in the event of his intestacy. And where a certain sum was settled in trust for an intended wife, "as and for her jointure, in full lieu, bar, and satisfaction of any dower or thirds which she could or might claim at common law out of all or any of the estate, real, personal, or freehold," of her intended husband, and he died intestate and without issue, it was

(a) See *In re Besant*, L. R. 11 Ch. D. 508; and *Besant v. Wood*, L. R. 12 Ch. D. 605.

(b) *Talbot v. Marshfield*, L. R. 3 Ch. Ap. 622.

(c) *Page v. Horne*, 11 Beav. 227.



held that this barred her claim to a moiety of his personal estate under the Statute of Distributions; the words "common law" meaning the general law, and not the common-law as opposed to the statute law (a). **3289.**

Pt. IV. T. 1,  
CH. 3. s. 8.

By the dissolution of marriage the husband loses all those rights which he would otherwise acquire jure mariti after that time. And hence, if the divorced wife dies before she has reduced a chose in action into possession, the divorced husband will have no right, either as her administrator or otherwise (b). But he does not lose the rights which a marriage settlement has given him (c). **3290.**

Loss of  
rights on  
dissolution  
of marriage.

By the stat. 22 & 23 Vict. c. 61, s. 5, "the Court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents, as to the Court shall seem fit." **3291.**

Power of  
Divorce  
Court to  
apply  
settled  
property.

[A wife might formerly commit many acts of a criminal nature with respect to her husband's property, without rendering herself liable to criminal proceedings by him. But the criminal liability of the wife to her husband is now extended by stat. 45 & 46 Vict. c. 75 (Appendix), which enacts by s. 16, "A wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband."] **3291a.**

Acts of wife  
liable to  
criminal  
proceedings.

(a) *Gurly v. Gurly*, 8 Cl. & Fin. 743. Much of this Chapter is taken from the writer's "Manual of Equity Jurisprudence."

(b) *Wilkinson v. Gibson*, L. R. 4

Eq. 162.

(c) *Fitzgerald v. Chapman*, L. R. 1 Ch. D. 563; *Burton v. Sturgeon*, L. R. 2 Ch. D. (Ap.) 318.

## CHAPTER IV.

## OF INFANTS.

PART IV.  
T. 1, CH. 4.Appoint-  
ment of  
guardian.

By the stat. 12 Car. 2, c. 24, s. 8, a father of an unmarried legitimate child may by deed or will appoint any person, in possession or remainder, except a Popish recusant, to be a guardian, until such child shall attain the age of twenty-one years, or for any less time. And by the same section a father might by will, as he may still by deed, make such an appointment, though not himself of full age; but by the stat. 1 Vict. c. 26, s. 7, no will made by any person under the age of twenty-one years shall be valid. By s. 9 of the stat. 12 Car. 2, c. 24, the authority of the guardian so appointed is to extend to the custody of the profits of the real estate, and the custody, tuition, and management of the personal estate of the ward. **3292.**

See Guardian-  
ship of Infants  
Act 1886 (49  
50 Vict. c. 27)

A mother cannot appoint a guardian. Nor can a father make a valid appointment of a guardian to his natural child. If, however, he does nominate a person to be guardian, the Court will appoint such person to that office (a). **3293.**

## SECTION I.

*Of the Acts which an Infant may or may not do.*PR. IV. T. 1,  
CH. 4, S. 1.Conveyance  
to an infant.

If a conveyance, etc., is made to an infant, the deed becomes void, in case he, when adult, disagrees to it, or in case his heir disagrees after his death, where he died during

(a) 11 Jarm. & Byth. by Sweet, 460; *Sleeman v. Wilson*, L. R. 13 431, 432; 1 Jarm. Wills, 2nd ed. Eq. 36.  
25, 34; Macpherson on Infants, 83,

his minority, or died after he came of age without having agreed to it (*a*). **3294.**

PT. IV. T. 1,  
CH. 4, s. 1.

Infants may, even at law, bind themselves, under certain circumstances, by contracts for necessities suitable to their degree and quality, and may bind themselves by acts which the law requires them to do (*b*). But, in general, where a contract may be either for the benefit or to the prejudice of an infant, he may avoid it, as well at law as in equity. Where it can never be for his benefit, it is void (*c*). **3295.**

Contracts.

By the stat. 37 & 38 Vict. c. 62, s. 1, it is enacted, that "all contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent, or to be lent, or for goods supplied, or to be supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void. Provided always, that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable." **3295a.**

An infant may purchase real property, because it may be for his benefit; yet upon his attaining his full age, he may either agree or disagree to it without showing any cause; and so may his heir if he dies under age or without having agreed to it (*d*). And if an infant enters into a contract for the purchase of an estate, he cannot enforce it in equity, because the remedy is not mutual (*e*). **3296.**

Purchases.

An infant cannot, at common law, alien his estate, unless by force of a custom, not even if a special power is

Alienation.

(*a*) 1 Pres. Shep. T. 70; Watk. Conv. 3rd ed. by Prest. 243.

(*b*) Story's Eq. Jur. § 240; Co. Litt. 172 a; Burton, § 199. And see Smith's Common Law Manual, 9th ed.

(*c*) Story's Eq. Jur. § 241; Bur.

ton, § 199.

(*d*) 4 Cruise T. 32, c. 26, § 6; 2 Pres. Shep. T. 235, 235; Sugd. Concise View, 541; 2 Bl. Com. 292; Co. Litt. 2 b.

(*e*) Sugd. Concise View, 149.

PR. IV. T. 1,  
CH. 4, s. 1.

given him (*a*). But the owner of gavelkind land may alien by feoffment at the age of fifteen years (*b*). **3297.**

Contracts  
for annui-  
ties.

By the stat. 17 Geo. 3, c. 26, s. 6, and 53 Geo. 3, c. 141, s. 8, it is enacted, that all contracts for the purchase of any annuity with an infant shall be utterly void. **3298.**

Execution  
of powers,  
etc.

An infant, like a femme covert, may at common law do any act where he is a mere instrument, and his interest is not concerned (*c*). Thus an infant is capable of executing a bare authority (*d*). And an infant can exercise a power even though it be coupled with an interest, when an intention appears that it should be exerciseable during minority (*e*). But an infant cannot sell an estate devised or conveyed to him in trust to sell; for a testator or grantor cannot confer upon an infant a capacity of discretion in the way of contract which the law does not give him (*f*). **3299.**

Presenting  
to a bene-  
fice.

An infant of the most tender age may present to a benefice! (*g*). **3300.**

Fine or  
recovery.

If a fine or recovery by an infant was once admitted (except in the case of a recovery suffered by attorney), it could not be reversed without a personal examination of the party by the Court during the continuance of his minority (*h*). **3301.**

Feoffment.

Deed taking  
effect by  
delivery.

If an infant makes a feoffment and gives livery of seisin in person, it is not void, but only voidable (*i*). And even a deed which takes effect by delivery, without an additional ceremony, if executed by an infant, is voidable only, and not void, at least if it is for his benefit (*j*). **3302.**

(*a*) 1 Sugd. Pow. 211; Co. Litt. 171 b, n. (5).

L. R. 7 Ch. D. 728.

(*b*) 2 Bl. Com. 84; Co. Litt. 171 b, n. (5).

(*f*) *King v. Bellord*, 1 Hem. & Mil. 343.

(*c*) 1 Sugd. Pow. 211.

(*g*) 3 Cruise T. 21, c. 2, § 24; Burton, § 200; Co. Litt. 89 a, n. (1), and 172 a.

(*d*) 4 Cruise T. 32, c. 13, § 28; 2 Sugd. Pow. 7th ed. 537—541; 1 Jarm. Wills, 2nd ed. 30; Watk. Conv. 3rd ed. by Prest. 246.

(*h*) Burton, § 198.

(*i*) 4 Cruise T. 32, c. 4, § 23; Burton, § 199.

(*e*) *In re Cardross's Settlement*,

(*j*) *Allen v. Allen*, 2 D. & W. 307.

By the stat. 1 Will. 4, c. 65, ss. 3—8, infants may be admitted to copyhold estates, by their guardians or attorneys (a). **3303.**

Pr. IV. T. 1,  
Ch. 4, s. 1.

Admittance  
to copy-  
holds.

By ss. 12 and 15 of the same Act, infants or their guardians may, by order of the Court, surrender leases, and take new leases, to the same uses and liable to the same trusts, charges, incumbrances, dispositions, and conditions as the leases surrendered. **3304.**

Surrender-  
ing leases  
and taking  
new ones.

By ss. 16, 18, 20, and 21, infants, or if they are out of the jurisdiction, some other person, by order of the Court, may accept surrenders of leases and execute new leases. **3305.**

Accepting  
surrenders  
of leases  
and grant-  
ing new  
ones.

By s. 17, by direction of the Court, an infant, or his guardian in his name, may grant leases of any land belonging to him, when it is for his benefit; but no lease is to be made of the capital mansion-house and the park and grounds held therewith, for any period exceeding the infant's minority. And the Court has no jurisdiction under this statute to lease an infant's estates, unless the infant is indefeasibly seised either in fee or in tail in possession (b). **3306.**

Granting  
leases of  
estates of  
infants.

We have seen, however, that by the stat. 19 & 20 Vict. c. 120, additional leasing powers were given in the case of infants (c). [But this Act was repealed by stat. 40 & 41 Vict. c. 18 (Appendix), by which more extensive powers are substituted.] **3307.**

[With reference to sales and leases of land on behalf of infant owners, it is enacted by s. 41 of stat. 44 & 45 Vict. c. 41 (Appendix), that "Where a person in his own right seised of or entitled to land for an estate in fee simple, or for any leasehold interest at a rent, is an infant, the land shall be deemed to be a settled estate within the Settled Estates Act, 1877." And by s. 42 of the same

Stat. 44 & 45  
Vict. c. 41.  
The Con-  
veyancing  
and Law of  
Property  
Act, 1881.

(a) See supra, par. 2723.

(c) See supra, par. 1905—8.

(b) *Ex parte Legh*, 15 Sim. 445.

Pr. IV. T. 1,  
CH. 4, s. 1.

[statute full powers of management of the land, and of receiving and applying the income, during the minority of the infant, are conferred on the trustees. **3307a.**

Stat. 45 & 46  
Vict. c. 38.  
The Settled  
Land Act,  
1882.

Provision is also made respecting the property of infants by stat. 45 & 46 Vict. c. 38 (Appendix), which enacts, "Where a person who is in his own right seised of or entitled in possession to land, is an infant, then for the purposes of this Act the land is settled land, and the infant shall be deemed tenant for life thereof" (s. 59); and "Where a tenant for life, or a person having the powers of a tenant for life under this Act, is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life under this Act, the powers of a tenant for life under this Act may be exercised on his behalf by the trustees of the settlement (a), and if there are none, then by such person and in such manner as the Court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance orders" (s. 60). **3307b.**

The interest of an infant, as one of the next of kin, in land formerly belonging to a partnership, but which had been retained by an administrator *in specie*, is settled land within the meaning of s. 59 of stat. 45 & 46 Vict. c. 38 (Appendix); and the Court will make an order, under s. 38 of that statute, for the appointment of trustees to exercise the powers conferred by that Act, but without prejudice to any question as to the interests of the infants next of kin (b).] **3307c.**

Independently of these enactments, it was a rule that an infant could not make a lease of his lands, unless it was evidently beneficial to him (c). Hence, if an infant is seised of land in fee simple, and he makes a lease for years of it, rendering no rent, this lease is void. But if there

(a) *In re the Duke of Newcastle's Settled Estates*, L. R. 24 Ch. D. 129.

(b) *Re Wells*, 31 W. R. 764.

(c) 4 Cruise T. 32, c. 5, § 66; Burton, § 199.

is a rent reserved upon the lease, then the lease is but voidable, and may, by the acceptance of the rent after his full age, be made good (*a*). **3308.**

PT. IV. T. 1,  
CH. 4, s. 1.

By the stat. 1 Will. 4, c. 65, s. 26, a guardian, with the approbation of the Court, may enter into agreements for or on behalf of the infant. **3309.**

Agreements  
on behalf of  
infants.

By the stat. 18 & 19 Vict. c. 43, s. 1, it is enacted, that, “from and after the passing of this Act, it shall be lawful for every infant upon or in contemplation of his or her marriage, with the sanction of the Court of Chancery, to make a valid and binding settlement or contract for a settlement of all or any part of his or her property, or property over which he or she has any power of appointment, whether real or personal, and whether in possession, reversion, remainder, or expectancy; and every conveyance, appointment, and assignment of such real or personal estate, or contract to make a conveyance, appointment, or assignment thereof, executed by such infant, with the approbation of the said Court, for the purpose of giving effect to such settlement, shall be as valid and effectual as if the person executing the same were of the full age of twenty-one years: Provided always, that this enactment shall not extend to powers of which it is expressly declared that they shall not be exercised by an infant.” But by s. 2, it is provided, “that, in case any appointment under a power of appointment or any disentailing assurance shall have been executed by any infant tenant in tail under the provisions of this Act, and such infant shall afterwards die under age, such appointment or disentailing assurance shall thereupon become absolutely void.” And by s. 4, it is further provided, “that nothing in this Act contained shall apply to any male infant under the age of twenty years, or to any female infant under the age of seventeen years.” **3310.**

Marriage  
settlements.

(*a*) 2 Pres. Shep. T. 268.

PT. IV. T. 1,  
CH. 4, s. 1.

Before this enactment a male infant could not bind himself by a settlement of his real or personal estate; nor could the property of a female infant be bound, except so far as regards a settlement of personal estate not given for her separate use (*a*). **3311.**

Letter of  
attorney.

An infant cannot in general execute a letter of attorney (*b*). **3312.**

Exchange.

An exchange of corporeal hereditaments made between an infant and another, is not void, but voidable only; for the infant, at his full age, or, if he dies under age or without having agreed to it, his heir, may either affirm or avoid it as he may choose (*c*). **3313.**

Wills.

Under the old law, males of the age of fourteen years and females at the age of twelve might make a will of personal property (*d*). But real estate could not be devised by an infant, unless by special custom (*e*). And by the stat. 1 Vict. c. 26, s. 7, it is enacted "that no will made by any person under the age of twenty-one years shall be valid." **3314.**

Perform-  
ance of  
condition.

If an estate is made to an infant upon an express condition, the infant will be bound to perform it (*f*). **3315.**

## SECTION II.

### *Of Portions and Legacies to Infants.*

PT. IV. T. 1,  
CH. 4, s. 2.

A portion is a pecuniary provision made for a child by a parent or person standing in loco parentis. **3316.**

What is a  
portion.

A legacy by a parent to a child is presumed to be a portion, although it be not so expressed; because providing for a child is a duty which the relative situation of the

(*a*) Macpherson on Infants, 519—527; 4 Cruise T. 32, c. 2, § 21; 1 Cru. T. 7, c. 1, § 31.

(*b*) 1 Pres. Shep. T. 217; Burton, § 201. But see Watk. Conv. 3rd ed. by Prest. 242—3.

(*c*) 4 Cruise T. 32, c. 6, § 9; 2

Pres. Shep. T. 291, 299.

(*d*) 2 Bl. Com. 497; Co. Litt. 89 b, n. (6).

(*e*) 6 Cruise T. 38, c. 2, § 5.

(*f*) 2 Cruise T. 13, c. 2, § 17; Co. Litt. 246 b, 380 b.



parties imposes upon the parent. The duty which is imposed upon the parent may be assumed by any other person, who for any reason thinks proper to place himself in that respect in the place of the parent; and when that is so, the same presumptions will arise as in the case of a legacy or gift by a parent. **3317.**

Pr. IV. T. 1,  
Ch. 4, s. 2.

There are some doctrines applicable to portions which would not be applied to a gift as between strangers (a). **3318.**

If there is a limitation to the parent for life, with a term to raise portions at twenty-one or marriage, and the interests are vested, the portions must be raised at that age or on marriage, by sale or mortgage of the reversionary term, unless there is something to indicate an intention that the portions should not be raised until the term falls into possession (b). If the portions are not raiseable till the parent's death, they will not carry interest, except from that time, though they may have become vested previously, unless there is some clear indication of intent that they should carry interest in the meantime (c). **3319.**

Time for  
raising  
portions.

If a portion or legacy charged on land is made payable on an event personal to the party to be benefited, and such party dies before that event happens, the portion or legacy is not to be raised out of the land. But it is otherwise if the payment is postponed until the happening of an event not referable to the person of the party to be benefited, but to the circumstances of the estate out of which the portion or legacy is to be paid (d). **3320.**

Where  
portions or  
legacies are  
not to be  
raised.

Where a portion is charged on land, and no particular time is fixed for the vesting, if the child dies before the time when the portion is needed, the portion shall not be raised; for it is reasonable that the land should be eased

(a) 2 Spence's Eq. Jur. 394.

248; supra, par. 3017 a.

(b) 2 Spence's Eq. Jur. 405;  
Coote Mortg. 3rd ed. § 131.

(c) *Massy v. Lloyd*, 10 H. L. Cas.

(d) 2 Spence's Eq. Jur. 396;  
*Parker v. Hodgson*, 1 Dr. & Sm.  
568.

PT. IV. T. 1.  
CH. 4, s. 2. of the charge when the only motive for making the same is at an end (*a*). **3321.**

Payment of  
legacy to an  
infant.

An executor cannot, without personal risk, pay the whole or any part of a legacy directly bequeathed to an infant, either to the child or to any person for his use (*b*). But by 36 Geo. 3, c. 52, s. 31, an executor may pay the legacy of an infant into Court, after deducting the duty, without suit, and when the legatee attains twenty-one he may petition for it (*c*). **3322.**

### SECTION III.

#### *Of Maintenance.*

PT. IV. T. 1,  
CH. 4, s. 3.

Law prior to  
stat. 23 & 24  
Vict. c. 145,  
s. 26.

Where the  
legatee is a  
child of the  
testator, or  
treated as  
such.

Let us first consider the law as it stood prior to the stat. 23 & 24 Vict. c. 145, s. 26, [which is now repealed (*d*).]

Where a legatee is under age, and is a child of the testator, or one towards whom he has placed himself in loco parentis, and no maintenance or interest is given, there even though the legacy is contingent, interest will be allowed to such legatee from the time of the death of the testator (*e*), or from the birth of the legatee, if the legatee was in ventre sa mere at the time of the father's decease (*f*). Where the legatee is a child of the testator, and maintenance or interest is given by the will, and the amount or rate is specified, the legatee will not in general be entitled to claim more than the maintenance or interest specified (*g*). Where, however, the amount specified is insufficient, and the legacy is vested, the Court will allow a reasonable maintenance, even though the surplus interest be directed to accumulate (*h*). **3323.**

Where the

Where legacies are given to grandchildren of the tes-

(*a*) 2 Spence's Eq. Jur. 398.

(*b*) 1 Rep. Leg. by White, 883.

(*c*) 1 Rep. Leg. by White, 882.

(*d*) See infra, par. 3332 a.

(*e*) 2 Rep. Leg. by White, 1257,

1270, 1348; *Martin v. Martin*, L. R. 1 Eq. 369.

(*f*) 2 Rep. Leg. by White, 1260.

(*g*) 2 Rep. Leg. by White, 1261.

(*h*) 2 Rep. Leg. by White, 1262.

tator, or to any class of infants who are strangers to the testator, upon a future or contingent event, and the will is silent as to interest or maintenance, and there is a limitation over to others, the Court will allow interest in the shape of maintenance, if those other persons consent (*a*). And where there is no limitation over, and all or some of the class of legatees must absolutely take the fund, there, all having an equal chance of taking, the Court will allow interest in the shape of maintenance, if the father of the legatees is not of ability to maintain them (*b*). **3324.**

Pt. IV. T. 1,  
CH. 4, s. 3.

legatee is a  
grandchild  
or stranger.

Where a legacy is vested, but no maintenance is directed, the Court will order it, though the interest is directed to be accumulated (*c*). **3325.**

Where  
accumula-  
tion is  
directed.

Though a sum be directed to be paid periodically for maintenance, until the time for the payment of the portion, the child will be entitled to a proportionate part during the interval between the last periodical payment and that time (*d*). **3326.**

Apportion-  
ment.

The Court is governed by a regard to the circumstances and state of the family to which the infant belongs, in respect to the allowance of any maintenance at all, and to the amount of such allowance. So that although there may be a trust for maintenance under which the whole income may be applied, yet the Court will not apply more of it than necessary, where the infants have other sources of income (*e*). And if the father is able, out of his own property, to maintain the infant, the Court will ordinarily withhold all allowance from the property or income of the infant for his maintenance, even though there may be a power (as distinguished from a trust), in the settlement or will, at the discretion of the trustees, to appoint part of the income for the purpose of his maintenance and

Mainte-  
nance  
depends on  
circum-  
stances and  
state of  
family.

Rule where  
the father is  
able to  
maintain his  
children.

(*a*) 2 Rop. Leg. by White, 1279.

(*b*) 2 Rop. Leg. by White, 1283.

(*c*) 2 Spence's Eq. Jur. 462.

(*d*) Story's Eq. Jur. § 479; 2

Spence's Eq. Jur. 462.

(*e*) *White v. Grant*, 18 Beav. 571.

PT. IV. T. 1,  
CH. 4, S. 3.

education (a). But if there is a contract on marriage, amounting to a trust, that property shall be applied for the maintenance and education of the children, the property must be applied, without reference to the ability of the father to maintain and educate them; because the father has thereby contracted for such a benefit or relief to himself (b). And an allowance will not be withheld, though the father be of ability to maintain the children, if it would be a hardship upon him and injurious to others of his children who take no benefit under the will and are dependent on the father, by diminishing his means of maintaining them (c). And where the interest of children's legacies is given to a parent, to be applied for or towards their maintenance and education, there, in the absence of a contrary intention, the parent takes the interest subject to no account, provided only that he or she discharges the duty of maintaining and educating the children in a competent manner. And the reference to "the accumulations, if any," will not afford an indication of a contrary intention, if it is capable of being referred to the case of the trustees themselves applying the income for the maintenance and education of the children, instead of paying it over to the parent for that purpose (d). But if the fund is given to the parent in trust for the maintenance of his children, though he is entitled to apply it for that purpose, whatever may be his ability, he must account for the application, like any other trustee (e). 3327.

If the infant is an eldest son and the younger children have no provision made for them, an ample allowance will be decreed to the infant, so that the younger children may

(a) Story's Eq. Jur. § 1354 a, and 773.

note; 2 Spence's Eq. Jur. 462, 466;  
2 Rop. Leg. by White, 1292.

(b) 2 Rop. Leg. by White, 1297;  
11 Jarm. & Byth. by Sweet, 662;

2 Spence's Eq. Jur. 466—468;  
*Ransome v. Burgess*, L. R. 3 Eq.

(c) 2 Rop. Leg. by White, 1293.

(d) *Brown v. Paull*, 1 Sim. (N. S.)

92; 11 Jarm. & Byth. by Sweet,  
662; 1 Jarm. Wills, 2nd ed. 329.

(e) 11 Jarm. & Byth. by Sweet,  
662.

be maintained; and the Court will act in a similar way where the father or mother of the infant is in distress or narrow circumstances (*a*). **3328.**

In the case of devises and bequests to a woman, in terms or in effect, for the support or benefit of her children, or of herself and her children, there is often a question whether she is to take a part of the beneficial interest; or, on the other hand, whether she is to take the beneficial interest, subject to a trust for her children, and what is the duration of such trust; or whether she is to take the whole without any trust. All such questions should be excluded (*b*). In general, when the income of property is given to the mother of a family, for the maintenance of herself and her children, what is intended is, that she shall receive the whole of the income; and shall maintain the children out of it, so long as they form part of her family. But in such a case, when a daughter marries, she loses the right to maintenance (*c*). A direction by will that the testator's widow shall receive all the income of his real and personal estate, and pay and apply the same to and for the use of herself and the children of their marriage, agreeable and according to her own discretion, during her life, confers upon the wife a discretionary power, which the Court will not disturb, so long as it is reasonably and honestly exercised (*d*). **3329.**

In the absence of indication to the contrary, the words "maintenance, education, and bringing up," standing together, have reference to minority only. But where a provision is made for "the maintenance and education" or "the maintenance, education, and bringing up" of a per-

Devises and bequests to a woman for her children, or for herself and children.

Effect of gifts for maintenance, education, and bringing up.

(*a*) Story's Eq. Jur. § 1355; 2 Spence's Eq. Jur. 461, 462; 2 Rop. Leg. by White, 1296.

2 Hare 607; *In re Harris*, 7 Exch. 344.

(*b*) For instances, see *Gilbert v. Bennett*, 10 Sim. 371; *Jubber v. Jubber*, 9 Sim. 503; *Thorp v. Owen*,

(*c*) *Bowden v. Laing*, 14 Sim. 113; 2 Spence's Eq. Jur. 461, and see cases referred to in n. (*b*).

(*d*) *Costabadie v. Costabadie*, 6 Hare 410.

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son during the life of another, such person is entitled to the benefit of the provision during the whole of that period (*a*); and it has been held that if such person dies before that period expires, his representatives are entitled to the amount of the income accruing between his death and that of the person for whose life the provision was to last (*b*). And where the income of real or personal property is directed to be applied for the "maintenance" or "the support" or "the maintenance and education" of a person, though at the time an infant, he is, generally speaking, entitled to the income during his life (*c*). "Education" includes maintenance. But a legacy given to a mother for "maintenance" of her children is not, by the terms of the bequest, applicable to their education. Where maintenance is given during minority, as a general rule it does not cease on the marriage of the child (*d*). A direction that the testator's daughter shall reside with and be maintained by his son so long as she shall remain single, only entitles her to maintenance so long as he lives, and so long as she chooses to reside with him (*e*). Where a testator bequeaths personal estate to trustees, amongst other things to pay and apply a certain sum in and upon the education of a child, this is an absolute legacy to the child, and he is entitled to have the whole at once severed from the testator's estate, with interest from the end of the first year after the death of the testator, and invested for his benefit (*f*). And where a testator devised estates to trustees, in trust to pay, out of the rents, £300 a year for the maintenance, clothing, and education of his son's children, during his son's life,

(*a*) *Badham v. Mee*, 1 Russ. & My. 631; *Bayne v. Crowther*, 20 Beav. 400.

(*b*) *Webb v. Kelly*, 9 Sim. 469; *Bayne v. Crowther*, 20 Beav. 400.

(*c*) *Soames v. Martin*, 10 Sim. 287; *Kilvington v. Gray*, 10 Sim. 293; *Alexander v. M'ulloch*, 1

Cox 391; *Carr v. Living* (No. 2), 33 Beav. 474; *Wilkins v. Jodrell*, L. R. 13 Ch. D. 564.

(*d*) 2 Spence's Eq. Jur. 460; 2 Rop. Leg. by White, 1496.

(*e*) *Wilson v. Bell*, L. R. 5 Ch. Ap. 581.

(*f*) *Noel v. Jones*, 16 Sim. 309.

and the son had three children, all of whom attained twenty-one, and then one died, it was held that the whole of the fund was not to be applied for the maintenance, clothing, and education of the survivors, but that the personal representative of the deceased child was entitled to one-third of the £300 a year during the parent's life; the words "maintenance, clothing, and education" being considered equivalent to "the benefit" of the children (a). **3330.**

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A power of advancement for setting up sons and daughters in business, will not entitle trustees to make advances for such a purpose to married daughters (b). **3331.**

Powers of  
advance-  
ment.

By stat. 23 & 24 Vict. c. 145, s. 26 (c), "in all cases where any property is held by trustees in trust for an infant either absolutely or contingently on his attaining the age of twenty-one years (d), or on the occurrence of any event previously to his attaining that age, it shall be lawful for such trustees, at their sole discretion, to pay to the guardians (if any) of such infant, or otherwise to apply for or towards the maintenance or education of such infant, the whole or any part of the income to which such infant may be entitled in respect of such property, whether there be any other fund applicable to the same purpose, or any other person bound by law to provide for such maintenance or education, or not; and such trustees shall accumulate all the residue of such income by way of compound interest, by investing the same and the resulting income thereof from time to time in proper securities, for the benefit of the person who shall ultimately become entitled to the property from which such accumulations shall have arisen: Provided always, that it shall be lawful for such trustees at any time, if it shall appear to them expedient,

Stat. 23 & 24  
Vict. c. 145,  
s. 26, as to  
income of  
property of  
infants.

(a) *Lewes v. Lewes*, 16 Sim. 266. par. 3125—7 a.

(b) *Talbot v. Marshfield*, L. R. 4 Eq. 661.

(d) *In re Cotton*, L. R. 1 Ch. D. 232; *In re George*, L. R. 5 Ch. D.

(c) But see ss. 32—4, *supra*, (Ap.) 837.

Pr. IV. T. 1, CH. 4, s. 3. to apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year." **3332.**

Stat. 44 & 45  
Vict. c. 41,  
s. 43.  
The Con-  
veyancing  
and Law  
of Property  
Act, 1881.  
Application  
by trustees  
of income  
of property  
of infants,  
for main-  
tenance, etc.

[That section is now repealed by stat. 44 & 45 Vict. c. 41 (Appendix), which enacts by s. 43, "(1) Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education or not. (2) The trustees shall accumulate all the residue of that income in the way of compound interest, by investing the same and the resulting income thereof from time to time, on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise; but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year. (3) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument, and to the provisions therein contained. (4) This section applies whether that instrument comes into operation before or after the commencement of this Act." ] **3332a.**



## CHAPTER V.

## OF ILLEGITIMATE CHILDREN.

BASTARDS, or natural or illegitimate children, that is, such children as are not born either in lawful wedlock or within due time after its determination, being regarded in law as nullius filii, are incapable of succeeding, by act of law, to the real or personal estate of their father or mother or any other person, in case of intestacy (a). But when a man has an illegitimate son, and afterwards marries the mother, and has by her a legitimate son, and the illegitimate son (bastard eigné) on his father's death enters upon the land, and dies seised thereof, whereby the inheritance descends to his issue, in this case the legitimate son and all other heirs, though minors, femmes covert, or under any incapacity whatever, are totally barred of their right (b). **3333.**

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Bastards  
incapable of  
succession.

We have seen that bastards cannot have any heirs, except the children or remoter issue of their own bodies (c). **3334.**

Succession  
to real estate  
of bastards.

If a bastard, who, as nullius filius, can have no kindred, or any other person having no kindred, dies intestate, without wife or child, his effects, subject to his debts, belong to the Sovereign, as ultimus hæres; who usually grants them, with the exception of a small part, by letters patent or otherwise: and then the grantee becomes entitled to the administration, and consequently to the sole enjoyment of the property (d). Where a bastard or other

Succession  
to personal  
estate of  
bastards.

(a) 2 Bl. Com. 247; *Birtwhistle v. Vardell*, 7 Cl. & F. 925, 934; and remarks of V.-C. *Kindersley*, in *Re Don's Estate*, 4 Drew. 199.

(b) 2 Bl. Com. 248; Litt. § 399

—401.

(c) *Supra*, par. 1264.

(d) *Wms. Exors.* 4th ed. 357, 1300.

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person having no kindred dies intestate, leaving a widow, but no children, the widow is entitled to one moiety only, and the Crown to the other (a). **3335.**

Succession  
in the case  
of a child  
born in  
Scotland  
before mar-  
riage.

Where a child is born in Scotland of parents domiciled there, who, at the time of his birth, were not married, but afterwards married in Scotland, he cannot take as heir to his father in England; nor can his father take as heir to him. For, though, being legitimate in Scotland, he is legitimate here also, as regards his personal status, yet by our law of inheritance he cannot inherit, nor have any heir except his own issue, because he was not born in lawful matrimony (b). **3336.**

Provision  
for illegiti-  
mate chil-  
dren not in  
esse.

No provision can be made for illegitimate children, unless they are in esse, and have acquired the name of children by reputation at the date of the instrument or at the time when it takes effect (c). It is an imperative duty, on the part of a putative father, towards the mother and the illegitimate children actually born or in ventre matris, as well as towards the public, to make a provision for those children; and therefore such a provision is consonant to law. But it is not the duty of a man to make a provision for illegitimate children to be begotten; on the contrary, his duty is at once to abandon any connection he may have formed, or to contract a lawful marriage; and it is contrary to the policy of the law to allow him by deed, or even by will, to make a provision for illegitimate children to be begotten at a future time. So that where a testator, after providing for each of the illegitimate children he had by his housekeeper, made a devise to such other child (if any) that might be born of her in his lifetime or in due time after his death, an after-born illegitimate child of hers, of which he was the reputed

(a) Wms. Exors. 4th ed. 358.

194, 199.

(b) *Birtwhistle v. Vardell*, 2 Cl. & Fin. 571; 7 Cl. & Fin. 895, 925, 934; *Re Don's Estate*, 4 Drew.

(c) 2 Pres. Shep. T. 235; 2 Jarm. Wills. 2nd ed. 202—4. And see cases *infra*.

father, took nothing (a). And this rule applies to the children of a man by his deceased wife's sister, though she may have gone through the ceremony of marriage (b). But an illegitimate child in the mother's womb is capable of taking by a proper description (c). Natural children unborn at the date of a will cannot take, however, under the description of children or issue of the testator or of another man, whether to be born of a particular woman or not, since the question whether in fact the grantor, settlor, testator, or other person was or was not the real father, is one which can only be ascertained by evidence that public policy forbids to be admitted; although, if the child en ventre sa mere be merely described as a child with which its mother is enceinte, without mentioning its father, otherwise than as its putative father, then the child will be capable of taking (d). **3336a.**

It is to be assumed that wherever a testator uses the word children, son or daughter, issue, nephew, or other relation, he *prima facie* means legitimate children, etc. The law will never allow an illegitimate child or relative, though born, and though recognized as a child or relative, to take by deed or will, merely under the general denomination of a child, or a son, or daughter, or issue, or next of kin, or relative of any kind, unless aided by something else in the deed or will itself, or unless the words cannot be satisfied by any other construction. And an illegitimate son will not take under the description of first-born son of his mother, though the testator well knew that her son was illegitimate. Evidence cannot be received to prove that illegitimate children were intended by the

When illegitimate children, in case, take under the denomination of children, or issue, or next of kin, or relatives.

(a) *Medworth v. Pope*, 27 Beav. 71.

(b) *Howarth v. Mills*, L. R. 2 Eq. 389.

(c) 2 Pres. Shep. T. 235; 2 Jarm. Wills, 2nd ed. 198; *Crook v. Hill*,

L. R. 3 Ch. D. 773.

(d) 1 Rep. Leg. by White, 80; 2 Pres. Shep. T. 235; 2 Jarm. Wills, 2nd ed. 199, 204; *Pratt v. Matthew*, 22 Beav. 328; *Lepine v. Bean*, L. R. 10 Eq. 160.

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testator to be included in the description of children, otherwise than by showing that it is impossible from the circumstances of the parties that any legitimate children could take under the bequest, or by showing that there were illegitimate children who had acquired the name and character of children by reputation, and showing the existence of other material circumstances, at the date of the will, proving that illegitimate children must have been intended (*a*). But in either of these cases, there may be a gift to living illegitimate children, and even as a class, though the class would not include illegitimate children not born or not in ventre matris at the time when the will speaks, but would include legitimate children of some future possible marriage. 3337.

It was held by the Lords Justices James and Mellish (*b*) (reversing the decision of V.-C. Wickens, and contrary to the opinion of the Lord Chancellor, Lord Selborne), that an illegitimate child of the testator, born between the date of the will and the death of the testator, and recognized and registered by him as his child by his deceased wife's sister, took under a devise and bequest for "all other the children which he might have or be reputed to have by M. L., then born or thereafter to be born." And in *Re*

(*a*) 2 Pres. Shep. T. 237 ; 1 Rep. Leg. by White, 80 ; 2 Jarm. Wills, 2nd ed. 181—197 ; *Durrant v. Friend*, 5 De G. & S. 343 ; *Gabb v. Prendergast*, 1 K. & J. 439 ; *Re Overhill's Trust*, 1 Sm. & Gif. 362 ; *Leigh v. Byron*, 1 Sm. & Gif. 486 ; *Worts v. Cubitt*, 19 Beav. 421 ; *Tugwell v. Scott*, 24 Beav. 141 ; *Kelly v. Hammond*, 26 Beav. 36 ; *Medworth v. Pope*, 27 Beav. 71 ; *Re Herbert's Trusts*, 1 Johns. & Hem. 121 ; *Re Standley's Estate*, L. R. 5 Eq. 303 ; *Clifton v. Goodbun*, L. R. 6 Eq. 278 ; *In Re Wells' Estate*, L. R. 6 Eq. 599 ; *Holt v. Sindrey*, L. R. 7 Eq. 170. As to children of an illegitimate

child see *Allen v. Webster*, 2 Gif. 177 ; *Edmunds v. Fessy*, 29 Beav. 223 ; *Barnet v. Tugwell*, 31 Beav. 232 ; *Lepine v. Bean*, L. R. 10 Eq. 160 ; *Crook v. Hill*, L. R. 6 Ch. Ap. 311 ; *Hill v. Crook*, L. R. 6 H. L. 265, 282—3 ; *Paul v. Children*, L. R. 12 Eq. 16 ; *In re Brown's Trust*, L. R. 16 Eq. 239 ; *In re Ayles' Trusts*, L. R. 1 Ch. D. 282 ; *Laker v. Hordern*, L. R. 1 Ch. D. 644 ; *Dorin v. Dorin*, L. R. 7 H. L. 568 ; *Ellis v. Houstoun*, L. R. 10 Ch. D. 236 ; *Megson v. Hindle*, L. R. 15 Ch. D. (Ap.) 198.

(*b*) *Occleston v. Fullalove*, L. R. 9 Ch. Ap. 147.

*Goodwin's Trusts* (a), Sir G. Jessel, M. R., held that where a testatrix bequeathed to her children by her deceased sister's husband, with whom she had gone through the ceremony of marriage, a child born between the date of the will and the death of the testatrix, and acknowledged and registered as such, took under the will. **3338.**

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(a) L. R. 17 Eq. 345.

## CHAPTER VI.

## OF PERSONS OF UNSOUND MIND.

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T. 1, CH. 6.

Contracts,  
or other acts  
of persons  
of unsound  
mind.

IN the case of contracts or other acts, however solemn, of persons who are idiots, lunatics, or otherwise of unsound mind or of weak understanding, wherever, from the nature of the transaction, there is not evidence of entire good faith, or it is not seen to be just in itself or for the benefit of those persons, Courts of Equity will set it aside, or make it subservient to their just rights and interest. But where there is entire good faith, and the contract or other act is for the benefit of such persons, as to provide them with necessaries, there Courts of Equity will uphold it, as well as Courts of Law (*a*). **3339.**

[In the case of insolvency of the estate of a lunatic, the Court will first make proper provision for the maintenance of the lunatic, and then distribute the remainder of the assets among the creditors, claims for past maintenance being paid in full (*b*).] **3339a.**

Where a lunatic tenant in tail of copyholds executes a power of attorney authorising her attorney to procure her admission as tenant in tail, and then to surrender them and take re-admission in fee, for the purpose of barring her entail, the estate tail is not barred (*c*). **3340.**

Conveyance  
by an insane  
person.

A person is not allowed to allege his own insanity, to avoid a conveyance made by him when insane. But after his death, his heir or other person interested may take advantage of his incapacity and avoid the grant.

(*a*) Story's Eq. Jur. § 227—229,  
234—238; *Longmate v. Ledger*, 2  
Gif. 157.

(*b*) *In re Pink*, L. R. 23 Ch. D. 577.  
(*c*) *Elliott v. Ince*, 7 D. M. & G.  
475.

And so, if a person purchases when insane, he cannot avoid the purchase himself; but if he dies insane, or does not afterwards, upon recovering his reason, agree to the purchase, his heir may either waive or accept the estate at his option (*a*). And after a person is found a lunatic by inquisition, his committee may vacate the purchase. And as the Sovereign has the custody of idiots upon office found, he may annul a purchase by an idiot (*b*). When, however, a person apparently of sound mind and not known to be otherwise by the vendor, enters into a contract for the purchase of property, which is fair and bonâ fide, and which is executed and completed, and the property, the subject-matter of the contract, has been paid for and fully enjoyed, such contract cannot be afterwards set aside either by the alleged lunatic or those who represent him; especially where the property cannot be restored so as to put the parties in their original position (*c*). **3341.**

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T. 1, CH. 6.

Purchases  
by such a  
person.

Where a voluntary deed is executed by a lunatic under a total misapprehension, it is inoperative (*d*). **3342.**

It may here be remarked, that, before a person is found a lunatic by inquisition, the presumption of law is in favour of his sanity; but after that, the presumption is against his sanity. The finding of insanity by the jury therefore shifts the burden of proof, but it is not conclusive on third persons (*e*). **3343.**

Presump-  
tion of  
sanity or  
insanity.

Madmen and lunatics, except during a lucid interval, idiots, or natural fools, and persons grown childish by reason of old age or disease, are incapable of making a

Wills of  
persons of  
unsound  
mind.

(*a*) 2 Bl. Com. 291—2; Sugd. Concise View, 542; 4 Cruise T. 32, c. 25, § 8; Co. Litt. 2 b, 247 b; Litt. s. 406.

(*b*) Sugd. Concise View, 245.

(*c*) *Molton v. Camroux*, 2 Exch. 487, 503; affirmed, 4 Exch. 17; Sugd. Concise View, 542; Phil. Lun. 17; Broom Com. 2nd ed. 538; Rosc.

on Evid. 10th ed. 452; Chit. Con. 7th ed. 131—4; Ad. Con. 5th ed. 944—5; Sm. Con. 3rd ed. 294—7.

(*d*) *Manning v. Gill*, L. R. 13 Eq. 485.

(*e*) *Snook v. Watts*, 11 Beav. 105; *Prinsep and E. I. Company v. Dyce Sombre*, 10 Moore P. C. 232, 239, 245—7.

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will (a). And the onus probandi lies on the party setting up a will made during the subsistence of a commission of lunacy, to establish the fact of a complete or partial recovery of the testator, at the time of giving instructions for and executing the will (b). But if a person of sound mind makes his will, it is not revoked or affected by his subsequent insanity (c). **3344.**

Lunatics  
cannot  
present.

Neither a lunatic nor his committee can present to a church. But the Lord Chancellor, by virtue of the general authority delegated to him by the Crown, presents to all livings whereof lunatics are patrons (d). **3345.**

Powers con-  
ferred by  
the Lunacy  
Regulation  
Act, 1853,  
and by the  
statutes 18  
Vict. c. 13,  
and 25 & 26  
Vict. c. 86.

By the stat. 16 & 17 Vict. c. 70 (by which so much of the stat. 1 Will. 4, c. 65, as relates to persons of unsound mind, and parts of certain other Acts mentioned in the schedule, are repealed), certain enactments are made for the admittance of lunatics to copyhold property, by their committees, or by attorney appointed by the lord, and for the payment of the fines due thereon (ss. 108—112). The committees may surrender leases and accept renewals (s. 113); and the expenses of renewals may be charged on the leasehold property (s. 114); and every lease renewed shall “operate and be to the same uses, and be liable to the same trusts, charges, incumbrances, dispositions, devises, and conditions, as the lease surrendered was subject to, or would have been subject to if the surrender had not been made” (s. 115). The property of lunatics may also, by order of the Lord Chancellor, be sold, mortgaged, or otherwise disposed of, for payment of debts or for future maintenance, or for other expenses therein

(a) 2 Bl. Com. 497; 1 Jarm. Wills, 2nd ed. 26. But see *Banks v. Goodfellow*, L. R. 5 Q. B. 549, as to the question whether partial unsoundness, not affecting the general faculties, and not operating on the mind of the testator in regard to testamentary dispositions, is suffi-

cient to render him incapable of testamentary disposition.

(b) *Prinsep and E. I. Company v. Dyce Sombre*, 10 Moore P. C. 232, 239, 245—7.

(c) Wms. Exors. 4th ed. 18, n. (c).

(d) 3 Cruise T. 21, c. 2, § 44.



mentioned (ss. 116, 117). The expenses of improvements may be charged on the lunatic's estate (s. 118); and the surplus of moneys to be raised under the previous sections will be of the same nature and character as the estate sold, mortgaged, charged, or disposed of (s. 119). Committees may, by order of the Lord Chancellor, sell, mortgage, let, divide, exchange, or otherwise dispose of land, in performance of contracts entered into prior to the lunacy (s. 122); and may, on a dissolution, by order of the Lord Chancellor, convey partnership property (s. 123); and committees, by the order of the Lord Chancellor, may also sell undivided shares of land, or make partitions or exchanges (s. 124); may sell lands for building purposes (s. 125); may dispose of business premises (s. 126); may dispose of undesirable leases or underleases (s. 127); may enter into certain agreements on behalf of lunatics (s. 128); may make leases and underleases (ss. 129—135); and may exercise powers vested in lunatics (ss. 136—138).

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T. 1, CH. 6.

### 3346.

Sections 129, 130, and 131 of this Act are explained and amended by the stat. 18 Vict. c. 13, whereby the committee of a lunatic tenant in tail is enabled, by order of the Lord Chancellor, to make leases so as to bind the lunatic and his heirs, and all persons claiming under the entail, or after the determination of, or in remainder or reversion expectant on the estate tail (*a*). **3347.**

[All powers given by stat. 40 & 41 Vict. c. 18 (Appendix), and all applications to the Court and proceedings connected with such applications under that Act, may be exercised by committees on behalf of lunatics (s. 49). And under stat. 45 & 46 Vict. c. 38 (Appendix), the committees of lunatics may, on their behalf, under an order of Court, to be obtained by petition, exercise the powers of tenants for life, under that Act (s. 62).] **3347a.**

Stata. 40 &  
41 Vict. c.  
18, and  
45 & 46  
Vict. c. 38.

(*a*) As to leases and sales of settled estates in which lunatics are interested, see *supra*, par. 1905 — 8.

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T. 1, CH. 6.

Stat. 25 & 26  
Vict. c. 86,  
ss. 1—15.

Stat. 45 & 46  
Vict. c. 82.

By the stat. 25 & 26 Vict. c. 86, ss. 1—15, in the case of insane persons not found lunatic by inquisition, whose property does not exceed £1000 in value or £50 per annum, the Lord Chancellor may apply such property for such person's benefit in a summary manner. Also by s. 16 the powers over the property of lunatics given by s. 116 of the stat. 16 & 17 Vict. c. 70 are extended. [And now by the more recent stat. 45 & 46 Vict. c. 82, this power of the Lord Chancellor is extended to the case of insane persons not found lunatic by inquisition, whose property does not exceed £2000 in value or £100 per annum.]

**3348.**

## CHAPTER VII.

## OF ALIENS.

*Of Aliens, under the Law prior to the Naturalization Act, 1870.*

WITH certain exceptions (*a*), a person born out of the Queen's dominions is an alien, until naturalized or made a denizen, unless such person's father is not attainted of treason, nor liable to its penalties, if he should return home, nor in the actual service of any hostile prince or state, and is either a natural-born subject (*b*), or is the son of a natural-born subject, having the three other above-named qualifications (*c*), or unless such person is the wife of a natural-born subject or naturalized person (*d*). **3349.**

PART IV.  
T. I, CH. 7.

Who aliens  
are.

By the common law, an alien might purchase, but he could not hold any real estate or chattel real; for if he purchased any real estate or chattel real, it was forfeited to the Crown, on office found, or on the death of the alien, whichever first happened. A lease for years of a house for convenience of merchandize is an exception to this; and though the stat. 32 Hen. 8, c. 16, s. 23, makes void all leases of houses or shops to an alien artificer or handi-

What aliens  
may  
acquire,  
and what  
they may  
hold.

(*a*) See Stamp's Index to the Statute Law, tit. "Alien."

(*b*) Stat. 7 Anne c. 5, s. 5; 4 Geo. 2, c. 21.

(*c*) Stat. 13 Geo. 3, c. 21; Burton, § 193; 3 Cruise T. 29, c. 2, § 13, 14. The words in the stat. 13 Geo. 3, c. 21, s. 3, are to be read "aliens' duties, customs, and impositions," as in Raithby's ed., and not "aliens, duties, customs, and impositions," as in the quarto ed. of 1774; and

therefore the grandchild of a natural-born subject, born out of the Queen's allegiance, is entitled to the benefit of the statute, in regard to holding lands as a natural-born subject, although he has not complied with the formalities specified in the 3rd section, which only refers to fiscal charges on subjects and on aliens. *Barrow v. Wadkin*, 24 Beav. 327.

(*d*) 7 & 8 Vict. c. 66, s. 16.

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craftsman, yet in favour of aliens this enactment has been construed very strictly (*a*). And further exceptions are created by the stat. 7 & 8 Vict. c. 66. By s. 3 of that Act, "every person now born, or hereafter to be born, out of Her Majesty's dominions of a mother being a natural-born subject of the United Kingdom, shall be capable of taking to him, his heirs, executors, or administrators, any estate, real or personal, by devise, or purchase, or inheritance, or succession." And after enacting, by the 4th section, that "every alien, being the subject of a friendly state, shall and may take and hold by purchase, gift, bequest, representation, or otherwise, every species of personal property except chattels real," it is by s. 5 enacted, "that every alien now residing in, or who shall hereafter come to reside in, any part of the United Kingdom, and being the subject of a friendly state, may, by grant, lease, demise, assignment, bequest, representation, or otherwise, take and hold any lands, houses, or other tenements, for the purpose of residence or of occupation by him or her, or his or her servants, or for the purpose of any business, trade, or manufacture, for any term of years not exceeding twenty-one years, as fully and effectually to all intents and purposes, and with the same rights, remedies, exemptions, and privileges, except the right to vote at elections for members of parliament, as if he were a natural-born subject of the United Kingdom." **3350.**

Produce of  
real estate.

Aliens may take under a will the produce of real estate thereby devised to trustees to be sold (*b*). **3351.**

Aliens not  
seised to  
uses.

Aliens cannot be seised to a use; and therefore, if a conveyance was made to an alien and a natural-born subject to uses, the moiety of the alien, upon office found, became vested in the Crown (*c*). **3352.**

(*a*) Sugd. Concise View, 540; 2 Pres. Shep. T. 232, n. (12); 4 Cruise T. 32, c. 2, § 38; 2 Bl. Com. 249; Burton, § 192; Co. Litt. 2 b.

(*b*) *Du Hourmelin v. Sheldon*, 4 My. & Cr. 525.

(*c*) 1 Cruise T. 11, c. 3, § 10.

Sir J. Stuart, V.-C., held that a trust to convey to an alien, is a trust incapable of taking effect, either for the benefit of the alien or of the Crown, and that the beneficial interest results to the heir of the testator (*a*). But Sir J. Romilly, M. R., held the cestui que trust takes under such a devise, but not being able to hold, the Crown becomes beneficially entitled (*b*). And Lord Hatherley, C., has affirmed this view, and decided that a Court of Equity will enforce, in favour of the Crown, a trust of real estate for an alien created prior to the statute 33 Vict. c. 14 (*c*). **3353.**

PART IV.  
T. 1, CH. 7.

Devises in  
trust to  
convey to an  
alien.

An alien may be naturalized by Act of Parliament, or (since the stat. 7 & 8 Vict. c. 66, ss. 6—12) by a certificate by the Secretary of State, or may be made a denizen by Royal letters patent; in either of which cases he becomes capable of holding real property purchased after that time (*d*). And if an alien purchased lands, and before office found the Sovereign made him a denizen by letters patent, and confirmed his estate, the confirmation was good (*e*). **3354.**

Naturaliza-  
tion and  
denization.

An alien could not protect himself by taking the conveyance in the name of a trustee (*f*). It was common, however, to limit lands to an alien from and after his naturalization, and it seems that on being naturalized, he was capable of taking and holding them. But aliens generally purchased in the names of their wives or children, by way of advancement to them (*g*). **3355.**

Ways in  
which aliens  
purchase.

An alien could not take by act of law, as by descent, curtesy, dower, or guardianship; because he could not hold, *et lex nihil facit frustra* (*h*). And so, if the husband was

Aliens can-  
not take by  
act of law.

(*a*) *Rittson v. Stordy*, 3 Sm. & G. 230.

(*b*) *Barrow v. Wadkin*, 24 Beav. 1.

(*c*) *Sharp v. St. Sauveur*, L. R. 7 Ch. Ap. 343.

(*d*) Burton, § 194; 1 Cruise T. 1 § 35; 3 Cruise T. 29, c. 2, § 19; 4

Cruise T. 32, c. 2, § 38; 2 Pres. Shep. T. 235; Sugd. Concise View, 540.

(*e*) Sugd. Concise View, 540.

(*f*) Sugd. Concise View, 540..

(*g*) 2 Pres. Shep. T. 235.

(*h*) 2 Pres. Shep. T. 232, n. (12)

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T. 1, CH. 7.

an alien, he did not acquire any right to a term of years belonging to his wife (*a*). **3356.**

Curtesy.

If, however, an alien was made a denizen, and afterwards had issue, he might be tenant by the curtesy in respect of such issue, though he would not be entitled on account of issue had before (*b*). **3357.**

Dower.

And though an alien was generally not dowable (*c*), yet, 1. The Queen Consort was dowable, though she were an alien (*d*). 2. An Act of Parliament was made in 8 Hen. 5, not printed among the statutes, by which all alien women who from thenceforth should be married to Englishmen by licence from the King, are enabled to have dower (*e*). 3. If an alien woman was naturalized by Act of Parliament, she then became entitled to dower out of all the lands whereof her husband was seised during the coverture. 4. Where an alien woman was created a denizen, she became entitled to dower out of all the lands whereof her husband was seised at and after the time when she was created a denizen, but not out of any lands whereof he was seised before, and which he had aliened (*f*). And 5. By the stat. 7 & 8 Vict. c. 66, s. 16, "any woman married or who shall be married to a natural-born subject or person naturalized shall be deemed and taken to be herself naturalized, and have all the rights and privileges of a natural-born subject." **3358.**

Descent  
from an  
alien.

An alien was not capable of transmitting by descent. If an alien was made a denizen by Royal letters patent and then purchased lands, his son born before denization did not inherit those lands; for the father before denization had no inheritable blood to communicate to his eldest son.

1 Cruise T. 5, c. 1, § 26; Co. Litt.

P. C. C. 216.

2 b (1).

(*d*) 2 Bl. Com. 131.

(*a*) 1 Cruise T. 8, c. 1, § 33.

(*e*) Co. Litt. 31 b; 1 Cruise T. 6,

(*b*) 1 Cruise T. 5, c. 1, § 26.

c. 1, § 30.

(*c*) Co. Litt. 31 b; 2 Bl. Com.

(*f*) 1 Cruise T. 6, c. 1, § 31.

131; *Count de Wall's Case*, 6 Moore

But a son born afterwards might inherit, even though his elder brother were living. And if the father were naturalized by Act of Parliament, such eldest son might then have inherited; for that had a retrospective force (*a*). **3359.**

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T. 1, CH. 7.

By the old law, an alien's sons born here might inherit to each other, because the descent was immediate (*b*). **3360.**

Descent  
through an  
alien.

By the stat. 11 & 12 Will. 3, c. 6, all persons, being natural-born subjects of the King, may inherit and make their titles by descent from any of their ancestors, lineal or collateral; although their father, or mother, or other ancestor, by, from, through, or under whom they derive their pedigrees, were born out of the King's allegiance. But inconveniences were afterwards apprehended, in case persons should thereby gain a future capacity to inherit, who did not exist at the death of the person last seised. As, if Francis the elder brother of John Stiles was an alien, and Oliver the younger was a natural-born subject, upon John's death without issue his lands would descend to Oliver the younger brother: now, if afterwards Francis had a child born in England, it was feared that, under the statute of King William, this new-born child might defeat the estate of his uncle Oliver. Wherefore it is provided, by the stat. 25 Geo. 2, c. 39, that no right of inheritance shall accrue by virtue of the former statute to any persons whatsoever, unless they are in being and capable to take as heirs at the death of the person last seised; with an exception, however, in the case where lands shall descend to the daughter of an alien; which descent shall be divested in favour of an after-born brother, or the inheritance shall be divided with an after-born sister or sisters, according to the usual rule of descents by the common law (*c*). **3361.**

(*a*) 2 Bl. Com. 249, 250.

(*c*) 2 Bl. Com. 251; Co. Litt. 8

(*b*) 2 Bl. Com. 250. See *supra*, a (2).  
par. 1276.

*Of Aliens under the Naturalization Act, 1870.*

By the stat. 33 Vict. c. 14, it is enacted (inter alia) that, "Real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien, in the same manner in all respects as through, from, or in succession to a natural-born British subject" (s. 2). **3362.**

This Act is not retrospective (a). **3363.**

*Of Roman Catholics.*

Roman  
Catholic  
disabilities.

It may be here observed, that, in addition to the other disabilities already mentioned, Roman Catholics were disabled by the stat. 11 & 12 Will. 3, c. 4, 3 Geo. 1, c. 18, and 11 Geo. 2, c. 17 (the latter of which is mostly repealed by the stat. 9 & 10 Vict. c. 59, s. 1), from purchasing any land, rents, or hereditaments; and all estates made to their use or in trust for them were void. But by the stat. 18 Geo. 3, c. 60, 31 Geo. 3, c. 32, and 43 Geo. 3, c. 30, they were enabled to qualify themselves by taking a special oath of allegiance. And by the stat. 10 Geo. 4, c. 7, s. 23, any special oath is declared unnecessary for enabling Roman Catholics to enjoy real or personal property (b). But by the 5th section of the stat. 11 Geo. 2, c. 17, which has not been repealed, "every grant to be made from and after the 6th day of May, 1738, of any advowson or right of presentation, collation, nomination, or donation of and to any benefice, prebend, or ecclesiastical living, school, hospital, or donative, and every

(a) *Sharp v. St. Sauveur*, L. R. 7 Ch. Ap. 343.

§ 209; 2 Bl. Com. 293; Anstey's Laws relating to Rom. Cath. 60—3.

(b) Burton, 7th ed. by Cooper,



grant of any avoidance thereof by any Papist or person making profession of the Popish religion, or any mortgagee, trustee, or person, anyways intrusted directly or indirectly, mediately or immediately, by or for any such Papist or person making profession of the Popish religion, whether such trust be declared by writing or not, shall be null and void, unless such grant shall be made bonâ fide, and for a full and valuable consideration to and for a Protestant purchaser or Protestant purchasers, and merely and only for the benefit of a Protestant or Protestants." "And every devise to be made from and after the said 6th day of May, by any Papist or person professing the Popish religion, of any such advowson or right of presentation, collation, nomination, or donation, or any such avoidance, with intent to secure the benefit thereof to the heirs or family of such Papist or person professing the Popish religion, shall be null and void." **3364.**

A right of presentation, collation, or nomination, vested in a Roman Catholic, is given by the stat. 12 Anne stat. 2, c. 14, s. 1, to the University of Oxford or the University of Cambridge, according to the situation of the benefice. **3365.**

## CHAPTER VIII.

OF CORPORATIONS (*a*).

PART IV.  
T. I, CH. 8.

Corporation  
aggregate  
and sole.

Necessity  
for the  
word suc-  
cessors to  
pass a fee.

CORPORATIONS are either aggregate, as the mayor and burgesses of a town, the master and fellows of a college, etc.; or sole, as a bishop or a parson and his successors. **3366.**

If land is given by deed to a person who is a corporation sole, and it is intended that it should vest in him in fee simple in his corporate capacity, it must be expressed to be given to him and his successors. The word successors, however, is not necessary to pass an estate in fee simple to a corporation aggregate, as it never dies (*b*). And an estate in fee will pass to the Sovereign without the words heirs or successors, partly on account of the Royal prerogative, and partly because in judgment of law the Sovereign never dies (*c*). **3367.**

Misnomer.

The name of a corporation in grants or conveyances need not be literally correct, so long as it is substantially correct in signification (*d*). **3368.**

A misnomer in a bequest to a corporation is immaterial, if the body intended is pointed out with sufficient certainty (*e*). **3369.**

Holding  
lands.

With some exceptions, corporations sole or aggregate whether ecclesiastical or temporal, cannot hold lands without licence (*f*). **3370.**

(*a*) See supra, par. 1331—3, on "Succession."

(*b*) 2 Bl. Com. 108 ; 4 Cruise T. 32, c. 21, § 9 ; Burton, § 130 ; Co. Litt. 8 a, 94 b.

(*c*) 2 Bl. Com. 209 ; 4 Cruise T. 32, c. 21, § 10.

(*d*) 3 Jarm. & Byth. by Sweet, 263.

(*e*) 3 Jarm. & Byth. by Sweet, 265 ; 1 Jarm. Wills, 2nd ed. 311.

(*f*) Sugd. Concise View, 541 ; supra, par. 785, 1532, 1533.

Except under Acts of Parliament for particular purposes, or by grant from the Crown, the parishioners or inhabitants of any place, or the churchwardens, are incapable of taking as immediate grantees of lands by those names. But they may take beneficially, by way of charitable trust, by those names. And it seems that in London the parson and churchwardens are a corporation to purchase lands (a). **3371.**

PART IV.  
T. 1, CH. 8.

Parishio-  
ners, parson,  
church-  
wardens, or  
inhabitants.

A grant by the Crown, as distinguished from a private individual, to a class of persons,—*e.g.*, the inhabitants of a parish,—for the purpose of taking a profit à prendre from land belonging to the Crown, is valid, as the Crown has the power to create corporations. No member of the class can sue as an individual, but such a grant constitutes the class a corporation, quoad the grant, and they must sue as a corporation (b). **3371a.**

A corporation, whether sole or aggregate, may convey or take by feoffment, and appoint an attorney to give or receive livery. And as a corporation cannot be seised to a use, feoffments have been commonly used by corporations to create freehold estates (c). But a conveyance by a corporation was also made by a lease at common law, perfected by an actual entry, a memorandum of which was indorsed on the lease, and followed by a release, enuring by way of enlargement, so as to be independent of the Statute of Uses (d). But it is presumed that corporations will now convey by statutory grant (e). **3372.**

Mode of  
conveyance  
by or to a  
corporation.

Generally speaking, a corporation cannot do any act except by writing under seal (f); which ought to be its common seal. But a corporation may seal with any other

Common  
seal.

(a) Sugd. Concise View, 540; Co. Litt. 3 a (4); *Willingale v. Maitland*, L. R. 3 Eq. 103.

(b) *Chilton v. Corporation of London*, L. R. 7 Ch. D. 735.

(c) 4 Cruise T. 32, c. 4, § 25; Watk. Conv. 3rd ed. by Prest. 121

—2, 165.

(d) 3 Jarm. & Byth. by Sweet, 242—3; 1 Pres. Shep. T. 205; Watk. Conv. 3rd ed. by Prest. 121, 184.

(e) See *supra*, par. 2107.

(f) 3 Jarm. & Byth. by Sweet 263.

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**T. 1, CH. 8.**

seal besides their common seal (*a*). And whenever it would occasion very great inconvenience to require their seal, it is dispensed with; as in the case of acts very frequently recurring, or too insignificant to be worth the trouble of affixing the common seal (*b*). **3373.**

**Delivery of  
deed of a  
corporation.**

The deed of a corporation does not need any delivery; for the apposition of their common seal gives perfection to it, without any further ceremony (*c*). **3374.**

**Stat. 45 & 46  
Vict. c. 21.  
The Places  
of Worship  
Sites  
Amendment  
Act, 1882.**

[The stat. 45 & 46 Vict. c. 21 (Appendix), authorizes corporations, whether ecclesiastical or lay, and whether sole or aggregate, and also other public bodies, to grant, convey, or enfranchise, under certain restrictions, land of such quantity and for such purposes as sanctioned by the Places of Worship Sites Act, 1873 (*d*).] **3374a.**

(*a*) 1 Pres. Shep. T. 56, 57.

(*b*) *Wells v. Kingston-upon-Hull*,  
L. R. 10 C. P. 402.

(*c*) 4 Cruise T. 32, c. 2, § 70.

(*d*) Stat. 36 & 37 Vict. c. 50.

## TITLE II.

### OF SOME MISCELLANEOUS HEADS OF LAW CONNECTED WITH CONVEYANCING.

#### CHAPTER I.

##### OF WASTE.

WASTE is that which tends to the permanent depreciation of the inheritance. It is either voluntary, which is an offence of commission, as by pulling down a house; or it is permissive, which is an offence of omission only, as by suffering it to fall for want of necessary repairs (*a*). **3375.**

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T. 2, CH. 1.  
Definition.

An act or omission is waste if it is injurious to the inheritance in any of these ways: 1. By diminishing the value of the estate. 2. By increasing the burden on it. 3. By impairing the evidence of title (*b*). **3376.**

#### I. *Different Kinds of Waste.*

Voluntary waste chiefly consists in these things:—1. Felling or destroying trees (*c*). 2. Destroying or injuring houses. 3. Opening mines or pits. 4. Changing the course of husbandry. 5. Destroying heirlooms (*d*). 6. Destroying certain kinds of living creatures which are regarded as part of the inheritance. **3377.**

Different  
kinds of  
voluntary  
waste.

1. A tenant for life may cut down timber trees for the **1. Waste in**

(*a*) Co. Litt. 53 a; 2 Bl. Com. 281; Burton, § 718.

(*c*) As to trees, see *Honywood v. Honywood*, L. R. 18 Eq. 306.

(*b*) *Jones v. Chappell*, L. R. 20 Eq. 539.

(*d*) 1 Cruise T. 3, c. 2, § 1.

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T. 2, CH. 1.

trees and  
hedges.  
For what  
purposes  
tenant for  
life may cut  
timber.

What is  
timber.

ordinary reparation of houses or fences; but he cannot cut down timber to build new houses or to repair those that he himself has improperly suffered to fall into decay (*a*). Timber trees are those which serve for building or reparation of houses; such as oak, ash, and elm, of the age of twenty years and upwards (*b*). By the custom of some counties, certain trees not usually considered as timber are deemed to be such, being there used for building (*c*). **3378.**

Stat. 45 & 46  
Vict. c. 38, s.  
35. The  
Settled Land  
Act, 1882.

[And the power of a tenant for life of settled land, to cut timber, is now extended by stat. 45 & 46 Vict. c. 38 (Appendix), which enacts by s. 35, “(1) Where a tenant for life is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees of the settlement or an order of the Court, may cut and sell that timber or any part thereof. (2) Three-fourth parts of the net proceeds of the sale shall be set aside as and be capital money arising under this Act, and the other fourth part shall go as rents and profits” (*d*).] **3378a.**

Destruction  
of germins,  
trees about  
a house,  
fruit trees,  
and fences.

If a tenant for life suffers the young germins or shoots to be destroyed, or cuts down willows, birch, etc., standing in the defence and safeguard of a house, or fruit trees standing in a garden or orchard, or suffers a quickset fence of whitethorn to be stubbed up or destroyed, it is waste (*e*). **3378b.**

Rights of  
tenant for  
life without  
impeach-  
ment of  
waste; or  
tenants in  
fee with an

Estates for life are often given “without impeachment of waste” (*f*), that is, without the liability to be sued for waste. **3379.**

Where a tenant for life, impeachable for waste, wrong-

(*a*) 1 Cruise T. 3, c. 1, § 19; Co. Litt. 53 b.

(*b*) 1 Cruise T. 3, c. 2, § 5; 2 Bl. Com. 281; Co. Litt. 53 a.

(*c*) 1 Cruise T. 3, c. 2, § 6; 2 Bl. Com. 281; Co. Litt. 53 a.

(*d*) See *In re The Duke of Newcastle's Settled Estates*, L. R. 24 Ch. D. 129.

(*e*) 1 Cruise T. 3, c. 2, § 8, 9; Co. Litt. 53 a.

(*f*) 1 Cruise T. 3, c. 2, § 51.

fully cuts down timber, the produce ought to be invested and accumulated for the benefit of the first estate of inheritance. Where timber is blown down, he is entitled to such parts as he might legally have cut (as thinnings, etc.), and to the interest produced by the investment of the rest (*a*). **3380.**

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T. 2, CH. 1.

executory  
devise over.  
Timber  
wrongfully  
cut by  
tenant for  
life, or  
blown  
down.

What a prudent owner would do in the proper or ordinary course of management is no measure of what a tenant for life without impeachment of waste may do, in regard to timber planted or left standing for ornament (*b*). **3381.**

Tenant for life, without impeachment of waste, has a right to fell timber and convert it to his own use (*c*), and he is entitled to the property of all timber trees blown down, and to the timber in a building which has been blown down. But he cannot delegate his right of cutting down timber to another person, so as to enable such person to exercise it after the death of the tenant for life (*d*). And a Court of Equity will also restrain a tenant for life without impeachment of waste, or a tenant in fee with an executory devise over, from cutting down timber serving for shelter or ornament to a mansion-house or its grounds, as also timber not fit to be felled: which is commonly called equitable waste, because it is deemed to be improper and restrainable in equity, though it used to be permitted at law (*e*). But in such cases before the late Act, the Courts will not give any satisfaction to the remainderman for timber actually cut down (*f*). **3382.**

By the stat. 36 & 37 Vict. c. 66, s. 25 (3), it is enacted that "an estate for life without impeachment of waste shall

(*a*) *Bateman v. Hotchkin* (No. 2), 31 Beav. 486; *Bagot v. Bagot*, 32 Beav. 509.

(*b*) *Ford v. Tynte*, 2 D. J. & Sm. 127.

(*c*) 1 Cruise T. 3, c. 2, § 51, 54.

(*d*) 1 Cruise T. 3, c. 2, § 56.

(*e*) 1 Cruise T. 3, c. 2, § 61; Co. Litt. 220 a, n. (1); *Turner v. Wright*, 1 Johns. 740; *Micklethwait v. Micklethwait*, 1 D. & J. 504.

(*f*) 1 Cruise T. 3, c. 2, § 64.

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not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate." **3383.**

Where a  
Court of  
Equity  
will permit  
timber to be  
felled.

A Court of Equity has in some cases directed the timber growing on an estate whereof a person was tenant for life to be cut down, for the purpose of paying debts and legacies charged upon the inheritance (*a*). The Court has also directed timber which was in a state of decay to be cut down for the benefit of the person who was tenant for life without impeachment of waste, subject to a long term, and was in a state of indigence, or in favour of the person entitled to the inheritance, where enough was left for hots, and the trees were not needed for the shelter or ornament of the house (*b*). **3384.**

Where a tenant for life has the next existing estate of inheritance, subject to intermediate contingent remainders in tail, a Court of Equity will not allow him to take advantage of that circumstance by cutting down timber, but will preserve it for the benefit of the intermediate contingent remaindermen (*c*). **3385.**

Rights of  
tenant for  
years.

The above restrictions apply, with even greater force, to tenants for years. Where the clause without impeachment of waste is inserted in a lease for years, it will have the same limited effect as when inserted in the conveyance of an estate for life (*d*). And a Court of Equity will not permit a tenant for years, though without impeachment of waste, to fell timber just before the expiration of the lease (*e*). **3386.**

2. Waste in  
houses.

2. Waste may be done in houses by pulling them down, or by suffering them to be uncovered, whereby the timbers

(*a*) 1 Cruise T. 3, c. 2, § 46.

(*b*) 1 Cruise T. 3, c. 2, § 49, 50.

(*c*) 1 Cruise T. 3, c. 2, § 43.

(*d*) 1 Cruise T. 8, c. 2, § 12.

(*e*) 1 Cruise T. 8, c. 2, § 14.



become rotten. If, however, a house is uncovered when the tenant comes in, it is no waste to suffer it to fall down ; but it would be waste to pull it down, unless it be rebuilt (*a*). If a lessee for life pulls down a house, and builds a new one which is either much larger or materially smaller than the former, it is waste (*b*) ; and it is waste to convert one kind of edifice into another, even though it is improved in value ; because it affects the evidence of the estate (*c*). If glass windows, though put in by the tenant himself, are broken or carried away, it is waste. So it is of wainscot benches, doors, floors, furnaces, and the like, annexed or fixed to the house either by the reversioner or the tenant (*d*). **3387.**

It used to be held that to erect a building where none existed before is waste (*e*). But the law now is that it is not waste to erect a building where there was none, unless it is an injury to the inheritance (*f*). **3388.**

A tenant for life, though without impeachment of waste, is obliged to keep tenants' houses in repair, unless the charge is excessive (*g*). **3389.**

It is a general rule, that waste which ensues from the act of God is excusable. So that, if a house falls in consequence of a tempest, the tenant will be excused. But yet where a house is uncovered by a tempest, the tenant is bound to repair it within a reasonable time before the timbers grow rotten (*h*). **3390.**

In consequence of the stat. 6 Anne c. 31, s. 7, tenants for life and others are not responsible for accidental fire, unless they covenant to repair, without excepting cases of accidental fire (*i*). **3391.**

(*a*) 1 Cruise T. 3, c. 2, § 11 ; Co. Litt. 53 a.

(*b*) 1 Cruise T. 3, c. 2, § 12.

(*c*) 2 Bl. Com. 281—2 ; 1 Cruise T. 3, c. 2, § 18.

(*d*) 1 Cruise T. 3, c. 2, § 13 ; 2 Bl. Com. 181 ; Co. Litt. 53 a.

(*e*) Co. Litt. 53 a.

(*f*) *Jones v. Chappell*, L. R. 20 Eq. 539.

(*g*) 1 Cruise T. 3, c. 2, § 58.

(*h*) 1 Cruise T. 3, c. 2, § 23 ; 2 Bl. Com. 181 ; Co. Litt. 53 a.

(*i*) 1 Cruise T. 3, c. 2, § 80, 81.

PART IV.  
T. 2, CH. 1.3. Waste as  
regards  
mines and  
pits.

3. A tenant for life, without impeachment of waste, may even open new mines. A tenant for life of land or of land and mines, if impeachable for waste, may not open new mines, but he may work open mines. A tenant for life, impeachable for waste, cannot dig for gravel, lime, clay, brick-earth, stone, or the like, where there are no pits open, unless for the reparation of buildings or the benefit of the estate. Where a lease is made of land, and mines are not mentioned in the lease, the tenant for life or years may work open mines, but may not dig for any new mine. And if there are open mines, a lease of the land, with the mines, will only give the right to work the open mines. But if there is no open mine, and the lease is of the land with all mines, the lessee may open mines (*a*). **3392.**

A power to grant leases, without mentioning mines, does not authorise a lease of unopened mines (*b*). **3393.**

Where a power is given of leasing hereditaments, and the coal and minerals under them, together with or separately therefrom, in terms showing an intention that the lease should extend to unopened mines, a clause that the lessees shall be punishable for waste, is repugnant and of no effect (*c*). **3394.**

4. Changing  
the course of  
husbandry.

4. The conversion of one kind of land into another, as the changing of meadow into arable, is also waste, because it not only changes the course of husbandry, but also affects the evidence of the estate (*d*). **3395.**

5. Destruction  
of  
heirlooms.

5. The destruction of heirlooms is waste (*e*). **3396.**

6. Waste as  
regards

6. Waste may also be committed in ponds, dove-houses, warrens, parks, and the like, by so reducing the number

(*a*) 1 Cruise T. 3, c. 2, § 14, 16; 532 Bl. Com. 282; Co. Litt. b, 54 b; Yool on Waste, etc., 52—55; *Bagot v. Bagot*, 32 Beav. 509; *Clegg v. Rowland*, L. R. 2 Eq. 165; *Elias v. Snowdon Slate Quarries Co.*, L. R. 4 Ap. Cas. 454.

(*b*) *Clegg v. Rowland*, L. R. 2 Eq. 160.

(*c*) *Daly v. Beckett*, 24 Beav. 114.

(*d*) 1 Cruise T. 3, c. 2, § 18; 2 Bl. Com. 182; Co. Litt. 53 b.

(*e*) 1 Cruise T. 3, c. 2, § 20.

of creatures therein that there will not be sufficient for the reversion (*a*). **3397.**

PART IV.  
T. 2, CH. 1.

living  
creatures.

## II. *Who may and who may not commit Waste.*

Tenant in fee or in tail has a right to commit every kind of waste; so that even a bond to restrain him from committing waste is void (*b*). **3398.**

Waste by  
tenants in  
fee or in  
tail.

A devisee in fee, subject to an executory devise over, is dispunishable for legal waste, unless restrained from committing it. But he is liable for equitable waste; and he may be restrained from committing legal waste by a clause of forfeiture (*c*). **3399.**

Tenants for life, whether their estates are created by deed or devise or by operation of law, are punishable or liable to be impeached for voluntary waste, unless their estates are made without impeachment for waste (*d*), or unless they are granted with partial powers to do waste (*e*). A Court of Equity will not permit tenant for life, without impeachment of waste, to commit waste upon an estate which is decreed to be sold, in order that the money should be invested in the purchase of another estate to the same uses; because in that case he would have the benefit of double waste (*f*). **3400.**

Waste by  
tenants for  
life.

Bishops, parsons, vicars, and other ecclesiastical persons, being considered in most respects as tenants for life of the lands which they hold jure ecclesiæ, are disabled from committing any kind of waste (*g*). By the stat. 35 Edw. 1, it is declared that parsons shall not presume to fell trees growing in the churchyard, but when the chancel or the body of the church requires reparations (*h*). A vicar

Waste by  
ecclesiasti-  
cal persons.

(*a*) 2 Bl. Com. 281; Co. Litt. 53 a.

(*b*) 1 Cruise T. 2, c. 1. § 32. 35; 2 Bl. Com. 115.

(*c*) *Turner v. Wright*, 2 D. F. & J. 234; *Blake v. Peters*, 1 De G. J. & S. 345.

(*d*) 2 Bl. Com. 122, 283; *Stragram v. Knight*, L. R. 2 Ch. Ap. 628.

(*e*) 1 Cruise T. 3, c. 2, § 68.

(*f*) 1 Cruise T. 3, c. 2, § 65, 66.

(*g*) 1 Cruise T. 3, c. 2, § 71.

(*h*) 1 Cruise T. 3, c. 2, § 72.

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may cut timber for proper and necessary woodwork repairs, but not for the purpose of making a general repairing fund (*a*). **3401.**

Waste by  
tenant for  
years.

Tenant for years may not commit any kind of waste, unless his lease is made without impeachment for waste (*b*). **3402.**

Waste by  
tenants at  
will.

Tenants at will may not commit any kind of voluntary waste. But they are not punishable for permissive waste; for they are not bound to repair (*c*). **3402a.**

Waste by  
tenants in  
common.

One tenant in common has no right to commit any waste of the nature of destructive waste (*d*). **3403.**

Waste by  
lord or  
tenants of  
a manor.

Every copyholder may, of common right, as incident to the grant, take housebote, hedgebote, and ploughbote upon his copyhold. But this right may be restrained by custom, namely, that the copyholder shall not take it, unless by assignment of the lord or his bailiff. In consequence of the right of the copyholder, the lord cannot cut down all the timber trees on a copyhold estate, but must leave sufficient for the reparation of the houses and for ploughbote, etc. (*e*). But by the general custom of most manors, timber and mines are the property of the lord, and a copyholder or a customary freeholder cannot commit any kind of waste, unless there is a particular custom to warrant it (*f*); and a copyholder for life is punishable for permissive waste (*g*). **3404.**

By reason of his ownership of the soil, subject only to the interests of the commoners, the lord may take and sell gravel, marl, loam, and the like, to the waste, and make any other use of the soil so long as he does not infringe on the commoners' rights (*h*). **3405.**

(*a*) *Somerby v. Fryer*, L. R. 8 Eq. 417.

(*b*) 1 Cruise T. 8, c. 2, § 2, 12.

(*c*) 1 Cruise T. 9, c. 1, § 10.

(*d*) 2 Cruise T. 20, § 9—13; *Arthur v. Lamb*, 2 Dr. & Sm. 428.

(*e*) 1 Cruise T. 10, c. 3, § 3, 7.

(*f*) 1 Cruise T. 10, c. 3, § 7; *Duke of Portland v. Hill*, L. R. 2 Eq. 765.

(*g*) 1 Cruise T. 10, c. 3, § 15.

(*h*) *Hall v. Byron*, L. R. 4 Ch. D. 667, 675.

## CHAPTER II.

OF MERGER (*a*).

MERGER is the absorption of the less estate into the greater, where two estates meet in the same person, without any such estate between them as will prevent them from coalescing. **3405a.**

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Definition.

Estates tail are not subject to merger ; so that a man may have at the same time, and in his own right, both an estate tail, and the immediate reversion in fee in the same land (*b*) ; because, the object of the statute De Donis being to render estates inalienable, if they were allowed to merge in the fee simple, tenants in tail might have destroyed them by purchasing the fee simple (*c*). **3406.**

Estates tail.

If an estate for life, and a greater estate immediately expectant upon it, whether in fee, in tail, or only for life, meet in the same person, the first estate is generally merged. And, for this purpose, an estate for a person's own life is considered greater than an estate for another's life, or one for the joint life of himself and another (*d*). And if an estate in tail or in fee in the same lands descends upon a tenant in tail after possibility of issue extinct, the estate tail after possibility of issue extinct is merged (*e*). A grant of the reversion to the tenant for life, though it be only conditional, causes an irrecoverable merger ; but when a surrender has been made upon condition, an entry for condition broken revives the estate (*f*). **3407.**

Estates for life.

(*a*) The whole of the third volume of Preston's Conveyancing relates to this subject.

(*b*) 1 Cruise T. 2, c. 1, § 37.

(*c*) 1 Cruise T. 2, c. 1, § 38.

(*d*) Burton, § 747 ; 1 Cruise T. 3, c. 1, § 14, 15 ; 1 Cruise T. 4, § 9.

(*e*) 1 Cruise T. 4, § 9.

(*f*) Burton, § 764.

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Estates for  
years.

Terms of years were anciently very short, and hence they were then, and still are, deemed in the eye of the law of less magnitude than an estate of freehold; and therefore, if the same person has a term of years and a freehold estate immediately succeeding it, and both in the same right, the term is merged (*a*). But a term at common law cannot be merged by surrender till the tenant has entered; for, before entry, there is no reversion in which the term can merge. If, however, the lessee for years enters, and afterwards assigns his estate to another, the assignee may merge the term by surrender before entry; because, by the entry of the lessee, the possession was severed and divided from the reversion (*b*). A term of years will merge in the immediate reversion, though that be a chattel interest, and even of shorter duration than the former (*c*), because a term in reversion, though for a less number of years, is accounted the higher estate. A Court of Equity will in some cases relieve against the merger of a term, and make it answer the purposes for which it was created (*d*). **3408.**

Estates by  
statute, re-  
cognisance,  
or elegit.

If a tenant of an estate by statute, recognisance, or elegit acquires the immediate reversion in fee of any part of the same land, whether by purchase or descent, his former estate in the whole land is extinguished (*e*). **3409.**

Estates in  
autre droit.

It would seem, 1. That where two estates meet in the same person in different rights, merger will not take place, where an injury would thereby be occasioned, and where the concurrence of the two estates, in the same person is entirely caused by the act of law, as by a descent; because *actus legis nemini facit injuriam*. 2. That where two estates meet in the same person in different rights, merger will not take place, even though the concurrence of the

(*a*) Burton, § 897; 1 Cruise T. 8, c. 2, § 41; Co. Litt. 54 b. 32, c. 7, § 13; Sugd. Concise View. 480.

(*b*) 1 Cruise T. 8, c. 2, § 41.

(*d*) 1 Cruise T. 8, c. 2, § 42.

(*c*) Burton, § 899; 4 Cruise T.

(*e*) Burton, § 926.

two estates is caused by the act of the owner of one of such estates, if an injury would thereby be occasioned to the owner of or the parties interested in the other estate. Thus, if a woman is tenant for life, with remainder to a man in tail, and they intermarry, the estates after marriage remain distinct (*a*), because otherwise the wife might be injured. And if the husband is tenant for life, with reversion to his wife in fee, there is no merger (*b*), for that might be an injury to the husband. But if the wife is tenant for life, and the reversion in fee is conveyed to the husband and wife, the estate for life is merged; for in this case both estates are vested in husband and wife: but if the wife survives her husband, she may revive it by expressing her dissent to the conveyance (*c*). If a man, who is a lessor, intermarries with a woman who is lessee for years, the term is not extinct, but the husband is possessed of the term in right of his wife during the coverture; because he has not done any act expressly to destroy the term, and it is cast upon him by the act of law, which would not be allowed to prejudice the wife. So, if a lessee grants the term to the wife of the lessor, it will not merge; for that would be allowing the lessee to prejudice the husband (*d*). If a man is seised in right of his wife, and a term is assigned to him, it is not merged; for that would be an injury to him (*e*). And so, if a termor for years marries, and afterwards the inheritance descends on his wife, the term is not merged, for the same reason (*f*). The husband's term will not merge in the wife's freehold, unless one or the other be acquired by purchase after the marriage, by active and immediate acquisition. If a husband is possessed of a term of

(*a*) Burton, § 754; *Chambers v. Kingham*, L. R. 10 Ch. D. 743, 745. Litt. 338 b; 1 Cruise T. 8, c. 2, § 30, 37.

(*b*) Burton, § 755.

(*e*) 1 Cruise T. 8, c. 2, § 30.

(*c*) Burton, § 756.

(*f*) 1 Cruise T. 8, c. 2, § 32;

(*d*) Sugd. Concise View, 480; Co. Sugd. Concise View, 478.

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years, and the owner of the reversion in fee devises it to the wife, who has issue, the husband, who, in the lifetime of the wife, is tenant by the curtesy initiate, holds the two estates in different rights, and there is no merger (*a*). If a man has a term in right of his wife, and purchases the freehold, the term is not merged, because the wife would thereby be prejudiced (*b*). If a lessee makes his lessor executor, the term is not merged; for that would be an injury to the lessee's estate, and might injure the lessor also (*c*). If a person having a term of years as executor, purchases the inheritance, the term is not merged, because that would prejudice creditors and others who are interested in the testator's estate, or, if merged, it is only so far as the executor's own interest is concerned (*d*). And in consequence of the 3rd section of the Statute of Uses, no term for years or other interest, whereof a person to whom lands are conveyed to uses is possessed in his own right, will be merged or destroyed by such conveyance (*e*). **3410.**

Estates in  
joint  
tenancy.

If a person is joint tenant of the first estate, and sole tenant of the second, his share only will be merged. Nor will even this partial merger take place unless the two estates are vested in him by several conveyances (*f*). **3411.**

On the other hand, if a person is sole owner of the first estate, and joint tenant of the second, his estate will be merged either for the whole or a part only of the tenement, according to the apparent intention with which the

(*a*) Burton, § 902 : Sugd. Concise View, 6, 7 ; *Jones v. Davies*, 5 Hurl. & Norm. 766 ; 7 Id. 507.

(*b*) 1 Cruise T. 8, c. 2, § 37, 38. [The preceding references to merger in respect of the property of husband and wife, must, in cases coming within the scope of stat. 45 & 46 Vict. c. 75 in the Appendix, be read subject to the modifications introduced by that Act. for which

see supra, Part IV. T. 1, Ch. 3.]

(*c*) 1 Cruise T. 8, c. 2, § 39 ; Sugd. Concise View, 480.

(*d*) See Sugd. Concise View, 481 ; 1 Cruise T. 8, c. 2, § 34—36 ; Burton, § 903.

(*e*) 1 Cruise T. 11, c. 3, § 37 ; 1 Cruise T. 8, c. 2, § 40 ; Burton, § 758 ; Sugd. Concise View, 480.

(*f*) Burton, § 748, 749 ; Co. Litt. 182 b.



two estates were brought together. Thus, if A. and B., being joint tenants in fee, make a lease for life to C., and C. afterwards surrenders the tenement to A., this will cause the estate for life to be entirely merged (*a*). But if C. were to convey his estate to A. by the same means as he might to a stranger, there, the intention being apparently not to destroy the estate, the merger would take place so far only as it must of necessity, that is, for one moiety: in consequence of which, A. would be seised of that moiety of the tenement in fee simple, and of the other moiety for the life of C., with reversion in fee to B. (*b*). **3412.**

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If the estate which is merged were, in any case, either previously to the transaction which caused the merger or by that transaction, charged with a rent or other incumbrance, or if an estate were created out of it, this charge or derivative estate would still subsist as long as the merged estate might have continued if it had not been merged; for it is a maxim that *actus legis nemini facit injuriam* (*c*). **3413.**

Effect on  
third  
persons.

Where the same person takes under a will a reversionary life estate in certain property, and a life annuity charged on the same property, the annuity will not merge by operation of law, in the life estate, when it falls into possession, where such merger would be injurious to the person entitled thereto (*d*). And where a tenant for life, or a remainderman in tail, whose estate may be altogether defeated, or a tenant in tail whose estate is subject to an executory devise over, pays off a charge, it will be presumed that he meant to keep it alive, unless there is evidence to the contrary (*e*). **3414.**

Merger of  
a charge.

(*a*) Burton, § 750.

(*b*) Burton, § 752.

(*c*) Burton, § 765; 4 Cruise T. 32. c. 7. § 3.

(*d*) *Byam v. Sutton*, 19 Beav. 556.

(*e*) Story's Eq. Jur. § 486; 2 Spence's Eq. Jur. 344, 345; *Horton v. Smith*, 4 K. & J. 624; *supra*, par. 1375.

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whose estate is not subject to an executory limitation over, and who can acquire the fee, becomes entitled to a charge upon the same estate, the general rule is, that the charge merges, unless it is the intention of the owner to keep it alive. This intention need not be expressed. It may be collected from words or acts. And it will be presumed where it would be injurious to him to merge the charge. So that where the merger of the charge would have let in other charges in priority, the Court will presume an intention to keep the charge on foot (*a*). **3415.**

Where the purchaser or owner of an estate or interest in real or personal property pays off a first incumbrance, or a first incumbrancer takes a conveyance of the equity of redemption, he should take proper steps to keep the first incumbrance on foot for his own benefit; because in some cases it has been held that if he does not, it merges, so that the next succeeding incumbrance becomes the first charge on the estate or interest (*b*). **3416.**

Where a tenant in tail entitled to a charge on the estate is an infant, the charge is not merged, if he dies under twenty-one; for this reason, amongst others, that until that age he cannot gain the absolute property in the land (*c*). **3417.**

What will  
prevent  
merger.

A vested remainder for years, interposed between the freehold and the inheritance, does not prevent their consolidation (*d*); because it is not an intervening portion of the seisin or ownership, but only confers a possessory right (*e*). And à fortiori, a mere interesse termini can

(*a*) Coote Mortg. 3rd ed. 395; 1 Jarm. Wills. 2nd ed. 591; 1 Story's Eq. Jur. § 486; 2 Spence's Eq. Jur. 308, 345; *Hatch v. Skelton*, 20 Beav. 453; *Grice v. Shaw*, 10 Hare 76; *Davis v. Barrett*, 14 Beav. 542; *Swinfen v. Swinfen* (No. 3), 29 Beav. 199; *Tyrwhitt v. Tyrwhitt*, 32

Beav. 244; *Sing v. Leslie*, 2 Hem. & Mil. 68.

(*b*) Fisher on Mortg. 443—7; Coote on Mortg. 3rd ed. 394: 5 Jarm. & Byth. by Sweet, 454.

(*c*) Coote Mortg. 3rd ed. 397.

(*d*) Burton, § 762.

(*e*) See supra, par. 360—8.

neither cause nor hinder the merger of any estate (*a*). And yet, if a person has a term for years, and a freehold estate, but there is a second term interposed between them, no merger will take place (*b*). If any freehold interest by way of contingent remainder is interposed between two estates, which in their creation are given to one person, the absolute coalition of them by merger in his hands is prevented; because otherwise the first estate would be created and destroyed in the same instant, which would be absurd (*c*). And for the same reason if a person is made tenant for life by will, with a contingent remainder to another, and the reversion in fee descends from the testator to his devisee for life, no merger will take place (*d*). In all cases, however, where a contingent remainder is the only obstacle to merger, there is such a coalition between the estates, that, if the second is of inheritance, and the first is in possession, the right of dower and most other incidents of a fee in possession will attach (*e*). And if two estates, capable of coalition by merger, become, by any act or event subsequent to their creation, vested for the first time in one person, a merger will take place, and by the old law, prior to the stat. 8 & 9 Vict. c. 106, s. 8, an intervening contingent remainder was destroyed (*f*). **3418.**

Merger was never favoured in Courts of Law, and still less in Courts of Equity (*g*). **3419.**

Merger not  
favoured.

By the stat. 36 & 37 Vict. c. 66, s. 25 (4), it is enacted that "there shall not, after the commencement of this Act, be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity." **3420.**

Merger.

- |   |   |
|---|---|
| <p>(<i>a</i>) Burton, § 907; <i>Hyde v. Warden</i>, L. R. 3 Ex. D. (Ap.) 72, 84.</p> <p>(<i>b</i>) Burton, § 898.</p> <p>(<i>c</i>) Burton, § 759.</p> <p>(<i>d</i>) Burton, § 760.</p> <p>(<i>e</i>) Burton, § 761.</p> <p>(<i>f</i>) Burton, § 760. See Smith's</p> | <p>Executory Interests annexed to Fearn, § 777—780 a; <i>Egerton v. Massey</i>, 3 Com. B. 338; and <i>supra</i>, par. 854.</p> <p>(<i>g</i>) Co. Litt. 338 b, n. (4); <i>Chambers v. Kingham</i>, L. R. 10 Ch. D. 743, 745.</p> |
|---|---|

## CHAPTER III.

## OF CONVERSION.

PART IV.  
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Where property which is wearing out, or reversionary property, or property invested in certain securities, should be converted.

WHERE property which wears out by effluxion of time (such as leaseholds) or property invested on securities, which, though yielding a high rate of interest, the Court does not adopt (such as bonds, shares in a company, or Dutch bonds), is given to be enjoyed by two or more persons in succession, it is a rule, that in order to accomplish the object of the testator, it must be converted into authorized securities, and the dividends paid to each person in succession, unless the person contesting the application of this rule can show that the will contains some sufficient indication of intention that the property is to be enjoyed in specie. This rule is for the benefit of the persons in remainder. And if reversionary property is made the subject of successive interests, the same rule applies, for the benefit of the first taker (*a*). As it is often made a point of dispute, whether an intention of enjoyment in specie is sufficiently indicated, it is desirable to exclude all doubt by express words (*b*). **3421.**

Where a testator wills that any of his Government stock may continue invested, this does not apply to any

(*a*) Lewin on Trusts, 2nd ed. 283; 2 Spence's Eq. Jur. 42, 552—557; 2 Rep. Leg. by White, 1343; 1 Jarm. Wills, 2nd ed. 516—519; *Morgan v. Morgan*, 14 Beav. 82, 83; *Sutherland v. Cooke*, 1 Coll. 498; *Johnson v. Johnson*, 2 Coll. 441; *Chambers v. Chambers*, 15 Sim. 183; *Pickup v. Atkinson*, 4 Hare 624; *Thornton v. Ellis*, 15 Beav. 193; *Blann v. Bell*, 5 De G. & S. 658; 2 D. M. & G. 775; *Bate v. Hooper*, 5

D. M. & G. 338; *Boys v. Boys*, 28 Beav. 436; *Rowe v. Rowe*, 29 Beav. 276; *In re Sewell's Estate*, L. R. 11 Eq. 80; *Thursby v. Thursby*, L. R. 19 Eq. 395.

(*b*) For instances, see *Lichfield v. Baker*, 2 Beav. 481; *Goodenough v. Tremamondo*, 2 Beav. 512; *Pickering v. Pickering*, 2 Beav. 31; *Pickup v. Atkinson*, 4 Hare 624; *Blann v. Bell*, 5 De G. & S. 658; 2 D. M. & G. 775; *Crowe v. Crisford*, 17 Beav.

securities which are not permanent (such as long annuities, which wear out), unless there is some indication to the contrary (*a*). **3422.**

Land directed, articted, contracted, conveyed, or devised to be sold, and turned into money, is reputed as money; and, as such, will not pass under a devise of land, but will pass under a residuary bequest, and in case of intestacy, will go to the personal representatives. And money directed, articted, covenanted, assigned, or bequeathed to be invested in land, has in equity many of the qualities of real estate, and in particular is descendible and devisable as such (*b*). But a mere direction that real estate is to be considered as personal or vice versâ, is insufficient to work a conversion (*c*). **3423.**

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Land articted, devised, etc., to be sold, and money articted, bequeathed, etc., to be invested in land.

Where the specific execution of a contract respecting land would have been decreed between the parties, it will be decreed between all persons claiming under them in privity of estate, representation, or title, unless other controlling equities have intervened (*d*). And where the heir of the purchaser came into equity for a specific performance, he might in general require the purchase-money to be paid out of the personal estate of the purchaser in the hands of his personal representatives (*e*). But by the stat. 17 & 18 Vict. c. 113, and the stat. 30 & 31 Vict. c. 69, this seems to be now altered. **3424.**

507; *Hood v. Clapham*, 19 Beav. 90; *Jebb v. Tugwell*, 20 Beav. 84; *Wearing v. Wearing*, 23 Beav. 99; *Skirring v. Williams*, 24 Beav. 275; *Holgate v. Jennings*, 24 Beav. 623; *Re Llewellyn's Trust*, 29 Beav. 171; *Vachell v. Roberts*, 32 Beav. 140; *Green v. Britten*, 1 D. J. & S. 649; *Brown v. Gellatley*, L. R. 3 Ch. Ap. 751; *Macdonald v. Irvine*, L. R. 8 Ch. D. (Ap.) 101.

(*a*) *Tickner v. Old*, L. R. 18 Eq. 422; *Porter v. Baddley*, L. R.

5 Ch. D. 542.

(*b*) Story's Eq. Jur. § 788—790, 1214 a; 2 Spence's Eq. Jur. 256—258, 264; 1 Jarm. Wills, 2nd ed. 493—4; 1 Lead. Cas. Eq. 666, 672; *Barham v. Earl of Clarendon*, 10 Hare 126; *Dixie v. Wright*, 32 Beav. 662.

(*c*) 1 Jarm. Wills, 2nd ed. 495.

(*d*) Story's Eq. Jur. § 788; see 2 Spence's Eq. Jur. 268—9.

(*e*) Story's Eq. Jur. § 790.

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If upon the death of the vendor a title cannot be made, or there was not a perfect contract, or the Court thinks that the contract ought not to be executed, there is no conversion of real estate into personal; and therefore the estate will go to the heir at law of the vendor. And so if upon the death of the purchaser a title cannot be made, or there was not a perfect contract, his heir or devisee will not be entitled to the money agreed to be paid for the lands, or to have any other estate bought for him (*a*). **3425.**

Election to take property in an unconverted state.

And where the conversion has not taken place, and the interest has vested absolutely, whether in land or money, in one person, he may elect to take the property in its unconverted state, and any act or declaration of his, unequivocally indicating an option in which character he takes the property, will determine the succession as between his real and personal representatives (*b*). But where it has vested in two or more persons, one cannot elect without the others or other (*c*). Also a person contingently entitled to the proceeds of real estate directed to be sold may, pending the contingency, elect to take the estate as realty (*d*). **3426.**

A stranger cannot enforce conversion.

A stranger (such as the Crown or the lord claiming in default of heirs) is not entitled to call for a conversion (*e*). **3426a.**

Clear intention of conversion necessary.

In general, Courts of Equity do not incline to change the quality of the property as the testator or intestate has left it, unless there is some clear act or intention by which he has unequivocally fixed upon it throughout a definite and different character (*f*). **3427.**

(*a*) Sugd. Concise View, 134; *Re Battersea Park Acts*, *Re Arnold*, 32 Beav. 591.

(*b*) *Cookson v. Cookson*, 12 Cl. & Fin. 121; Story's Eq. Jur. § 793, 1213; 2 Spence's Eq. Jur. 270, 271; 1 Jarm. Wills, 2nd ed. 507.

(*c*) *Holloway v. Radcliffe*, 23 Beav. 163.

(*d*) *Meek v. Devenish*, L. R. 6 Ch. D. 566.

(*e*) 2 Spence's Eq. Jur. 266.

(*f*) Story's Eq. Jur. § 1214.

Where the intention in marriage articles is plain, that a conversion should be made, but consents of the parties interested to the actual purchase cannot be obtained, as required by the instrument, by reason of their deaths or for some other cause, there, if any convenient purchase could have been obtained, the Court will take upon itself to judge whether such consents ought to have been given, and the conversion being the paramount object, it will be considered as made; else the parties to consent would have the option of determining whether the property should be real or personal, which, unless it be clearly given to them, will not be permitted. An equitable conversion of land into money or of money into land takes place by force of the direction, notwithstanding the conversion or investment is directed to be made with the approbation of certain parties; and legatees of legacies out of a property directed to be converted with the consent in writing of the tenant for life are entitled to their legacies, whether the property be converted or not; and the residuary legatees of the proceeds are entitled, subject to the legacies, to the estate itself, if not converted (a). **3428.**

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Consent to  
or approval  
of conver-  
sion.

Where personalty is directed to be converted as soon as conveniently may be, there, as between the executors and the persons interested in the estate, the personalty is to be considered as converted within a year, that being considered as the time within which, in the generality of cases, it may be converted with ordinary diligence (b). And where a sale of real estate is directed to be made with all convenient speed, twelve months is to be considered as the time within which a sale might reasonably be made, as regards the rights of a person who is to take a beneficial interest on the conversion of the property (c). **3429.**

Time  
allowed for  
conversion.

(a) 2 Spence's Eq. Jur. 260, 261.

(c) *Vickers v. Scott*, 3 My. & K.

(b) 2 Spence's Eq. Jur. 42, 565, 500.

n. (c); 1 Jarm. Wills, 2nd ed. 514.

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Liability  
to legacy  
duty con-  
sequent on  
direction for  
conversion.

If not accompanied by a direction to re-invest in land, an absolute direction to sell real estate in any event by converting it into personalty, renders it liable to the legacy duty, even though the beneficial donees should elect to take it in an unconverted state. But a mere trust for sale for payment of debts, or a discretionary power to sell, does not render the estate liable, at least if it is not sold (a). 3430.

Failure of  
objects for  
conversion  
under a will.

Where, in the events that happen, the contemplated object for which a conversion of land into money or money into land is directed by will to be made, does not exist at all, the Court will not vary the property from that state in which it was found at the death of the testator; for where the purpose fails the intention fails (b). But if any event has happened on which the conversion ought to have taken place, though the object for the conversion afterwards may have ceased to exist, or partially fails, the property will be treated as if converted (c). 3431.

Undisposed-  
of produce  
of real estate  
under a will.

Where real estate is directed by *will* to be sold for certain purposes, so much of the real estate or the produce thereof as is not effectually disposed of by the will at the testator's death, from silence, or from the invalidity of the testamentary disposition, or from the contingency not happening on which it was to take effect, or from subsequent lapse, will not go to the next of kin or to a residuary legatee, but will result to the heir, unless the testator has sufficiently declared his intention that the produce of the real estate should be deemed personalty, whether such purpose is to be effected or not: and the interest thus undisposed of results as part of the old use, and descends as realty to the heir, in his character of

(a) 11 Jarm. & Byth. by Sweet,  
612 (b); 2 Spence's Eq. Jur. 267;  
1 Jarm. Wills, 2nd ed. 505.

(b) 2 Spence's Eq. Jur. 234, 261;  
*Buchanan v. Harrison*, 1 Johns. &

Hem. 662, 673.

(c) See 2 Spence's Eq. Jur. 262;  
*Bagster v. Fackerell*, 26 Beav. 471;  
*Wall v. Coleshead*, 2 D. & J. 683;  
*Wilson v. Coles*, 28 Beav. 215.



heir, if the sale was unnecessary, but results to him as personalty, if the sale was necessary (a). If the testator directs expressly or by necessary implication that the proceeds of the real estate shall be considered as having been converted into personalty before his death ; and à fortiori if he directs that it shall be treated as personal estate for every purpose, whether disposed of by his will or not, and whether as regards legatees or next of kin, such a direction operates to give the next of kin, as against the heir, any portion of the proceeds that may lapse or not be effectually disposed of (b). But where it is possible to construe words of exclusion of the heir, or words expressive of an intention that the property should be considered as personal estate, as merely expressive of an intention that there should be a conversion for the purposes of the will, or that the exclusion of the heir was only intended for the accomplishment of the purposes of the will, and there is any purpose, however limited, as payment of costs, for which the conversion may have been directed, the heir will take, and not the next of kin. And no words, however strong, expressive of an intention to exclude the heir, will be sufficient for that purpose, unless there is a gift to the next of kin, either by express words or by plain implication. Hence a mere direction that the proceeds shall be deemed part of the personal estate, or a reference to a mixed fund by the name of personal estate, or even a direction that the proceeds shall be "considered to all intents and purposes part of the personal estate," will not be sufficient to give the surplus of the real estate to the next of kin. And it was even held

(a) 2 Spence's Eq. Jur. 233 ; 1 Rop. Leg. by White, 517, 533 ; *Ackroyd v. Smithson*, 1 Lead. Cas. Eq. 2nd ed. 690 et seq. ; *Taylor v. Taylor*, 3 D. M. & G. 190 ; *Robinson v. The Governors of the London*

*Hospital*, 10 Hare 19 ; *Buchanan v. Harrison*, 1 Johns. & Hem. 662, 673 ; 1 Jarm. Wills, 2nd ed. 526—9 ; 1 Lead. Cas. Eq. 704—5.

(b) 2 Spence's Eq. Jur. 237 ; 1 Rop. Leg. by White, 517.

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that the heir took, notwithstanding a declaration that the trustees should stand possessed of the proceeds as "a fund of personal and not of real estate," followed by the words "for which purpose I declare that such proceeds or any part thereof shall not in any event lapse or result for the benefit of my heir at law" (a). If, however, there appears to have been no particular motive for changing the nature of the real fund, and the testator has declared or shown an intent that he meant to dispose of his real as personal estate, then the land will pass under a residuary personal bequest as personal estate (b). If a testator converts his real estate for all the purposes of his will, so as to affect the character of the property as between the real and personal representatives of persons taking under the will, that will not prevent the heir from taking, by way of resulting trust, any part which is undisposed of, or not effectually disposed of; as where it is the subject of limitations which are too remote (c). But what he so takes will vest in him as personal estate (d), unless the other parts are devoted to the payment of charges, and he chooses to pay them off, and thereby prevent a sale, and take the estate (e). The question whether the surplus proceeds of the trust property belong to the real or personal representative is not affected by the state, whether of realty or personalty, in which such surplus is found, although the state of the property might affect the character in which such surplus would go to one or the other of such representatives (f). **3432.**

Undisposed-  
of produce

Where real estate is directed to be converted by *deed*,

(a) Sec 2 Spence's Eq. Jur. 237—8; 1 Jarm. Wills, 2nd ed. 530—1; 1 Lead. Cas. Eq. 706—7; *Johnson v. Woods*, 2 Beav. 409; *Flint v. Warren*, 16 Sim. 124; *Taylor v. Taylor*, 3 D. M. & G. 190; *Robinson v. The Governors of the London Hospital*, 10 Hare 19; *Fitch v. Weber*, 6 Hare 145.

(b) 1 Rep. Leg. by White, 523, 537.

(c) 2 Spence's Eq. Jur. 234; *Burley v. Evelyn*, 16 Sim. 290.

(d) 2 Spence's Eq. Jur. 242; *Burley v. Evelyn*, 16 Sim. 290.

(e) 2 Spence's Eq. Jur. 234.

(f) *Griffiths v. Ricketts*, 7 Hare 299.

even though not till after the death of the owner, there is a constructive conversion from the delivery of the deed, not only for the purposes of the deed, but "out and out," so as to cause any surplus that may not be effectually disposed of by the deed to result to the grantor, settlor, or mortgagor as personalty, and thereby preclude in equity the title of his heir from ever arising; unless, indeed, the whole of the purposes of conversion fail from the moment of the execution of the deed; in which case the entire property results to him as realty, as if no conversion had ever been directed (a). **3433.**

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T. 2, CH. 3.  
of real estate  
under a  
deed.

The same rule, for the same reason, would seem to apply to a sale of real estate *under an order of a Court of Equity*, on the application and in the lifetime of the owner: for there a constructive conversion would take place from the date of the order. But where the order is only for a sale of a part, or of so much as may be necessary, or the application for a sale is not made by the owner of the realty, but is made against his will, or he merely acquiesces in it, there it has been held by some judges that, although the estate be all converted, any surplus will belong to the heir at law; for the conversion will only be regarded as constructively co-extensive with the purposes of the suit or proceeding (b). But Sir G. Jessel, M. R., has held that, if the conversion is rightfully made, all the consequences of a conversion must follow (c). **3434.**

Undisposed-  
of produce  
of real estate  
under an  
order of a  
Court of  
Equity.

Where real estate is not made a subsidiary fund, but a testator creates from real and personal estate a mixed or general fund, and directs the whole of that fund to be applied for certain purposes, as for the payment of debts and legacies, he does in effect direct that the real and

Undisposed  
of part of  
mixed fund.

(a) *Biggs v. Andrews*, 5 Sim. 424;  
*Griffiths v. Ricketts*, 7 Hare 299;  
*Clarke v. Franklin*, 4 K. & J. 260;  
Lord Eldon's remarks in *Ripley v.*  
*Waterworth*, 7 Ves. 435; 1 Wms. on

Exors. 5th ed. 586, n. (c).

(b) *Cooke v. Dealey*, 22 Beav. 196;  
*Jerny v. Preston*, 13 Sim. 356.

(c) *Steed v. Perce*, L. R. 18 Eq.  
192, 197.

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personal estates which have been converted into that fund shall answer the stated purposes pro rata, according to their respective values. If any of those purposes fail, then the part of the fund which upon this principle would otherwise have been applicable to those purposes is undisposed of. So far as this part of the fund has been composed of real estate, the heir is to have the benefit of it, as so much real estate undisposed of, whether the estate be eventually sold or not; and so far as this part of the fund has been composed of personal estate, it is personal estate undisposed of, for the benefit of the next of kin (*a*). **3435.**

Undisposed-  
of part of  
money  
directed to  
be con-  
verted, or of  
the produce  
thereof.

Where money is bequeathed to be laid out in land, the same principle applies as where land is directed to be converted into money: the conversion will operate only so far as the will disposes of the land into which it is to be converted; so that if the land is devised for a limited estate only, the produce of the fund, or the fund itself, if unconverted, beyond the interest so given, will result to the testator's next of kin as personalty, unless it be given away to some other person (*b*). Where a testator directs his personal estate to be converted into real estate for certain purposes, some of which fail, there, after the purposes which can take effect are satisfied, the heir is not entitled to the unconverted personalty as impressed with the character of realty (*c*). But if there is a residuary legatee, he is entitled to it. And if it has not been converted, he may elect to take it either as realty or personalty. But if he dies without indicating his election, it will go to the person or persons entitled to his personal estate (*d*). Where personal estate is bequeathed upon trusts which ultimately fail, land purchased before the

(*a*) 2 Spence's Eq. Jur. 235 ;  
*Johnson v. Woods*, 2 Beav. 409 ;  
*Ackroyd v. Smithson*, 1 B. C. C. 503.

*v. Godlee*, 1 Johns. 536, 582.

(*c*) *Hereford v. Ravenhill*, 1 Beav. 481.

(*b*) 2 Spence's Eq. Jur. 235 ; 1  
Jarm. Wills, 2nd ed. 527 ; *Reynolds*

(*d*) *Hereford v. Ravenhill*, 5  
Beav. 51.

failure of the trusts goes to the next of kin as real estate (a). **3436.**

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Whenever a trade partnership purchase real estate for the partnership purposes, and with the partnership funds, it is, as between the real and personal representatives of the partners, personal estate. But where the land, and not the trade, is the principal object, and the trade is merely ancillary to the beneficial enjoyment of the land, or a part of it, the doctrine will not apply; so that, if one of the co-owners dies intestate, his share in the land will pass to his heir, and not to his legal personal representative (b). **3437.**

Real estate  
of a partner-  
ship.

(a) *Curteis v. Wormald*, L. R. 495, 506; *Steward v. Blakeway*, L. R. 6 Eq. 479; 4 Ch. Ap. 603.  
10 Ch. D. 172.

(b) *Darby v. Darby*, 3 Drewry

## CHAPTER IV.

## OF ELECTION.

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Definition.

**ELECTION** is the choosing between two rights, by a person who derives one of them under an instrument in which a clear intention appears that he should not enjoy both. **3438.**

Principle of election.

The principle of election is, that no one shall claim under and in opposition to the same instrument. There is a tacit condition annexed to all provisions of this nature, that the person taking do not disturb the disposition which his benefactor has made (*a*). **3439.**

Where election arises in equity.

Election arises in equity in cases where a grantor, or more commonly, a testator, gives away, either knowingly or by mistake, that in which he has no interest, or the whole of that in which another person besides himself has an interest, and in the same instrument makes a gift to the owner of the property so given away, or to the person entitled to such interest. In such cases the owner of such property, or the person entitled to such interest, cannot both take the gift and retain his own property or interest; but if he takes the gift, he must resign his own property or interest. On the other hand, if he elects to hold his own property or interest, or, as the phrase is, if he elects against the instrument, he cannot have the gift; or at least he cannot have the entire gift without compensating the person whom he has disappointed by electing to take his own property. In such cases, equity, in not suffering the disposition by which the gift is made

(*a*) 2 Sugd. Pow. 144—5.

to enure to the benefit of the person so electing against the instrument, will not render that disposition inoperative, but will make it the means of effectuating that intention of the author of the instrument which such person has frustrated by so electing to retain his own property or interest: for, equity will treat the gift, or at least a part of it, as a trust in the donee or devisee, the person so electing, for the benefit of the party disappointed by such person's refusing to give up his own property or interest (*a*). Indeed, the doctrine of election can never be applied where an election is made contrary to the instrument, unless the interest that would pass by it is of that freely disposable nature, that it can be laid hold of to compensate the party who suffers by the exercise of such election against the instrument. Thus, where there is a fund subject to the appointment of a father amongst his children, and the father appoints a part to some of his children and the other part to persons not objects of the power, any child who is an appointee may both take his appointed share, and also claim his share of the improperly appointed portion, as in default of appointment. But if there is a power to appoint to two, and the donee of the power appoints to one only, and gives a legacy to the other, he cannot claim the legacy and also dispute the validity of the appointment (*b*). So where a man, having a power to

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Election by  
an ap-  
pointee.

(*a*) See Story's Eq. Jur. § 1077, note, 1081—1084, 1086, 1088, 1089, 1093; 2 Spence's Eq. Jur. 586, 587, 588, 601—604; 2 Sugd. Pow. 155; 1 Jarm. Wills, 2nd ed. 371—3; *Swan v. Holmes*, 19 Beav. 471; *Wintour v. Clifton*, 21 Beav. 447; 8 D. M. & G. 641; *Stephens v. Stephens*, 3 Drewry 697; *Asticke v. Peters*, 4 K. & J. 437; *Grosvenor v. Durston*, 25 Beav. 97; *Fitzsimons v. Fitzsimons*, 28 Beav. 417; *Honywood v. Forster* (No. 2), 30 Beav. 14; *Howells v. Jenkins*, 2 Johns. & Hem.

706; *Whitley v. Whitley*, 31 Beav. 173; 1 D. J. & S. 617; *Miller v. Thurgood*, 33 Beav. 496; *Grissell v. Swinhoe*, L. R. 7 Eq. 291; *Coults v. Acworth*, L. R. 9 Eq. 519; *Cooper v. Cooper*, L. R. 6 Ch. Ap. 15; 7 H. L. 53; *Wilkinson v. Dent*, L. R. 6 Ch. Ap. 339; *Middleton v. Windross*, L. R. 16 Eq. 212; *Rogers v. Jones*, L. R. 3 Ch. D. 688.

(*b*) 2 Spence's Eq. Jur. 590; 2 Sugd. Pow. 148—9; *Re Fowler's Trusts*, 27 Beav. 362.

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Words not  
creating a  
case of  
election.

appoint to A. a fund which in default of appointment is to be given to B., exercises the power in favour of C., and gives other benefits to B., although the execution is merely void, yet if B. will accept the gifts to him, he must convey the estate to C. according to the appointment. Again, where a father authorized his wife to execute a power vested in himself, and gave the objects of the power other benefits, although the father could not delegate the power, yet it was held, that any person who should defeat what the mother had done by what was in truth no power, should have no benefit under the father's will (*a*). But words of mere desire, expectation, or wish, do not create a case of election (*b*). And hence, where a testator bequeaths his own property to persons who are objects of a power, and also appoints to them the fund over which he has the power of appointment, in terms which per se would give the absolute interest, but then adds a request that they would leave the appointed fund to their children, who are not objects of the power, the precatory words do not create a case of election either to accept a limited appointment, leaving the remainder for their children, or else to relinquish the legacies, but the words relating to the appointed fund amount to an absolute appointment to the objects of the power, with a condition inconsistent with the power, which is simply void; and therefore they are entitled to both funds (*c*). **3440.**

Primâ facie, it is not to be supposed, nor must it be proved by extrinsic evidence, that a testator disposes of that which is not his own, so as to raise a case of election. It must appear on the will itself, by plain demonstration or by necessary implication (*d*). **3441.**

(*a*) 2 Sugd. Pow. 148—9.

(*b*) *Langslow v. Langslow*. 21 Beav. 552.

(*c*) *Blacket v. Lamb*, 14 Beav. 482. See *supra*, par. 2133.

(*d*) 2 Sp. Eq. Jur. 592, 593, 595;

*Wintour v. Clifton*, 21 Beav. 447; 8 D. M. & G. 641; *Miller v. Thurgood*, 33 Beav. 496.



Where persons are named as residuary appointees, and also as legatees, in the same will, they are not obliged to elect between the residuary appointment and their legacies, so as to give up their residuary appointment or their legacies, in order to give effect to, or compensate the persons claiming under, a particular appointment void for remoteness; for they claim each gift under the will itself, and neither of them is *dehors* the will or adverse to it (*a*). **3442.**

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No election  
between  
gifts under  
same will.

The doctrine of election applies even where, in a will not within the Wills Act (1 Vict. c. 26), a devise of an estate is made to the testator's heir, and the heir, according to the old rule, takes such estate by descent, and not by purchase, and, by the same will, the testator devises to another person an estate belonging to the heir, over which the testator has no disposing power (*b*). **3443.**

Application  
of the  
doctrine to  
an heir at  
law.

The same doctrine of election also applies in cases where it was apparently a testator's intention to dispose of all the property he might have at the time of his death, and the heir, who is a devisee under the will, claims property which was purchased subsequently to the will, and which, consequently, under the old law, did not pass by the will, but was intended to pass to another person under the general words of the will (*c*). But where a will, made before the year 1838, is void as a devise of land, either from the incapacity of the deviser or from its not being duly executed, and is good as to personal estate, the heir may take a legacy under it, without relinquishing his right by descent; because, as to the land, there is in fact no disposition of it, and consequently no election (*d*).

(*a*) *Wollaston v. King*, L. R. 8 Eq. 165.

(*b*) Story's Eq. Jur. § 1094 : 2 Spence's Eq. Jur. 589 ; 2 Rop. Leg. by White, 1595 ; *Schroder v. Schroder*, 1 Kay 578 ; *Hanc ev. Trewhit*,

2 Johns. & Hem. 216.

(*c*) Story's Eq. Jur. § 1094 ; 6 Cruise T. 38, c. 2, § 28 ; Sugd. Concise View, 127 ; *Schroder v. Schroder*, 1 Kay 578.

(*d*) 6 Cruise T. 38, c. 2, § 26 ; 2

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But although the will were not duly executed according to the statute, still if it contained an express condition that any legatee who might not comply with its terms should forfeit all benefit under it, there the heir would, by force of the condition, be obliged to make his election (*a*).  
**3444.**

It applies  
to every  
kind of  
interest.

The doctrine is equally applied to all interests, whether immediate or remote, vested or contingent, of value or of no value, and whether in real or personal estate (*b*).  
**3445.**

It is not  
raised by  
subsequent  
events.

It has been held that the doctrine of election does not apply to an instrument which was valid at the time of execution as to all the property comprised in it, but was considered inoperative as to some of the property by subsequent events (*c*). **3446.**

To what  
extent a  
person  
electing  
against a  
will forfeits  
the devise  
or bequest.

According to the preponderance of authority and principle, a person electing against a will does not forfeit the whole of the benefit intended for him, where the value of the gift exceeds that of his own property or interest; but he is only obliged to compensate in value the claimant whom he has disappointed by his refusing to give up his own property or interest (*d*). For, a Court of Equity interfering to control his legal rights, for the purpose of executing the intention of the testator, is justified in its interference, so far only as that purpose requires (*e*).  
**3447.**

Where pro-  
perty of the  
person elect-  
ing is mort-  
gaged.

If the party has mortgaged the interest he takes in his own right, and then is suffered to elect to take under the will, the mortgage must be satisfied out of the interest provided for him by the will (*f*). **3448.**

Rop. Leg. by White, 1595; 1 Jarm. Wills, 2nd ed. 374.

(*a*) 2 Rop. Leg. by White, 1595; 1 Jarm. Wills, 2nd ed. 375.

(*b*) Story's Eq. Jur. § 1096; 2 Spence's Eq. Jur. 588; 1 Jarm. Wills, 2nd ed. 372.

(*c*) *Blaklock v. Grindle*, L. R. 7 Eq. 215.

(*d*) Story's Eq. Jur. § 1085; 2 Spence's Eq. Jur. 601—604; 1 Jarm. Wills, 2nd ed. 372—3.

(*e*) Story's Eq. Jur. § 1085, note.

(*f*) 2 Sugd. Pow. 154.

A person may decline one benefit given him by a will, such as a legacy charged with a portion, without being precluded from taking another benefit by the same will; unless it is fairly inferable, from the nature of the different benefits, that he should either take all or reject all (*a*). **3449.**

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Election  
as to one  
benefit.

Election may also arise where a person claims both under and in opposition to a settlement. It is a rule that a person will not be allowed to take under and against the same instrument (*b*). **3450.**

Election in  
the case of a  
settlement.

The party is not bound to make an election till all the circumstances are known. And if he should make a choice in ignorance of the real state of the funds, or under a misconception of the extent of the claims on the fund elected by him, it will not be conclusive on him. And in order to make an election, he is entitled to have a discovery, and to have all the accounts taken, to ascertain the real state of the fund (*c*). **3451.**

Election  
need not be  
made in  
ignorance  
of circum-  
stances.

Election by conduct must be by a person who has positive information as to his right to the property, and, with that knowledge, fully means to give that property up (*d*). **3452.**

An election may be presumed from a long acquiescence or from other circumstances (*e*). Remaining in possession of two estates held under titles not consistent with each other, affords no conclusive proof of the kind (*f*). The doctrine of election is not of the nature of a positive rule of law which a person is bound to know. And there-

Election  
presumed.

(*a*) Story's Eq. Jur. § 1081; see 2 Spence's Eq. Jur. 591.

1591—2; *Wintour v. Clifton*, 21 Beav. 447.

(*b*) *Anderson v. Abbott*, 23 Beav. 457; *Mosley v. Ward*, 29 Beav. 407; *Brown v. Brown*, L. R. 2 Eq. 485; *Codrington v. Lindsay*, L. R. 8 Ch. Ap. 578, 593; 7 H. L. 854.

(*d*) *Wilson v. Thornbury*, L. R. 10 Ch. Ap. 239.

(*c*) Story's Eq. Jur. § 1098; 2 Spence's Eq. Jur. 598; 2 Sugd. Pow. 154; 2 Rep. Leg. by White,

(*e*) Story's Eq. Jur. § 1097; 2 Spence's Eq. Jur. 598—600; 2 Sugd. Pow. 154; *Worthington v. Wigginton*, 20 Beav. 67.

(*f*) *Spread v. Morgan*, 11 H. L. Cas. 588.

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fore, in order to infer an election, it is necessary to show that the person who ought to elect was aware of the doctrine (a). **3453.**

No election  
in the case  
of creditors.

The doctrine of election is not applied in the case of creditors. They may take the benefit of a devise for payment of debts, and also enforce their legal claim against other funds disposed of by the will; for a creditor claims not as a mere volunteer, but for a valuable consideration, and *ex debito justitiæ* (b). **3454.**

Mistake  
as to  
amount  
of another's  
interest.

Where a testator gives one child a much larger property, under the mistaken impression that such child did not take under the testator's marriage settlement, he is not bound to elect between his interest under the settlement and the gift by will (c). **3455.**

Disability.

Where the person bound to elect labours under any disability, as infancy or coverture, the Court will consider whether it will be most beneficial for him to take under or against the will or deed, and will decree accordingly (d). **3456.**

Persons  
having  
separate  
rights of  
election as  
next of kin  
of persons  
who died  
without  
electing.

Where a person who had a right of election, dies intestate, without having exercised it, each of his or her next of kin has a separate right of election; so that neither the election of the majority nor of the heir and administrator will bind the others (e). **3457.**

(a) *Spread v. Morgan*, 11 H. L. Cas. 588.

(b) Story's Eq. Jur. § 1092; 2 Spence's Eq. Jur. 592; 1 Jarm. Wills, 2nd ed. 377.

(c) *Box v. Barrett*, L.R. 3 Eq. 244.

(d) 2 Spence's Eq. Jur. 587. As to election between dower or free bench, and benefits given by will, see *supra*, par. 522—7.

(e) *Fytche v. Fytche*, L. R. 7 Eq. 494.

## CHAPTER V.

OF SATISFACTION (*a*).

SATISFACTION may be defined to be, the making of a donation with the express or implied intention that it shall be taken as an extinguishment of some claim which the donee has upon the donor (*b*). **3458.**

PART IV.  
T. 2. CH. 5.  
Definition.

Satisfaction implies that something has been done in lieu of that which was contracted or intended to be done. But performance implies that the identical act which the party contracted to do, has been done (*c*). **3459.**

Difference  
between  
satisfaction  
and per-  
formance.

Equitable questions of satisfaction usually arise in three classes of cases :— **3460.**

Where  
satisfaction  
arises.

I. In cases of portions secured by a marriage settlement.

II. In cases of portions given by a will, and an advancement of a donee afterwards in the testator's lifetime.

III. In cases of legacies to creditors or debtors (*d*). **3461.**

It is advisable to observe in this place, with reference to all these classes of cases, that where the satisfaction is a matter of presumption, that presumption may be rebutted either by intrinsic evidence derived from the will itself, or by extrinsic evidence, as by declarations of the testator or written papers (*e*). **3462.**

Satisfaction  
resting on  
presump-  
tion may be  
rebutted.

(*a*) This chapter was originally taken from the writer's Manual of Equity Jurisprudence ; but with the addition of references to Roper's Legacies.

(*b*) See Story's Eq. Jur. § 1099—1101, 1106, and *infra* ; *Samuel v. Ward*, 22 Beav. 347.

(*c*) 2 Rop. Leg. by White, 1109.

(*d*) Story's Eq. Jur. § 1109.

(*e*) Story's Eq. Jur. § 1102 ; 2 Spence's Eq. Jur. 441—445 ; 1 Rop. Leg. by White, 391 ; 1 Jarm. Wills, 2nd ed. 343 ; *In re Tussaud's Estate*, L. R. 9 Ch. D. (Ap.) 363.

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T. 2, CH. 5.I. As to  
portions  
secured by  
settlement.

I. Where a portion or provision is secured to a child by a marriage settlement or otherwise, and the parent or person standing in loco parentis—that is, a person meaning to stand in the place of a parent as regards providing for a relation's child—afterwards by will gives the same child a legacy, whether particular or residuary, without expressly declaring it to be in satisfaction of such portion or provision, in such case, if the legacy is substantially the same in its value, in its nature, in time of payment, in certainty, and in benefit, with the portion or provision, and if it is not given for a different purpose, it will, in the absence of evidence to the contrary, be deemed a full satisfaction, as the presumption is against double portions. If the legacy is less in amount than the portion or provision, or if it is payable at a different period, then (looking to the weight of authority) it may be deemed a satisfaction pro tanto, or in full, according to the circumstances (a). A testamentary provision has been considered an advancement in the lifetime of the parent, in full or part satisfaction of the portion provided by a settlement which contains a declaration that advancement by the parent in his lifetime shall be considered in full or part satisfaction, unless the contrary is expressly declared in writing (b). Where, on a covenant to take effect on the death of the settlor, a portion is settled on the husband for life, and then on his wife and children, and an absolute gift of other property is afterwards made by the settlor by will in

(a) Story's Eq. Jur. § 1109, 1110, 1103, 1104; 2 Spence's Eq. Jur. 427—430, 432, 433, 438—440; *Lady E. Thynne v. Earl of Glengall*, 2 H. L. Cas. 153; 2 Rep. Leg. by White, 1071; Sir J. Remilly, M. R., in *Montague v. Montague*, 15 Beav. 572; *Pinchin v. Simms*, 30 Beav. 119; *Charlton v. West*, 30 Beav. 124; *Corentry v. Chichester*, 2 Hem. & Mil. 149; 2 D. J. & S. 336; S. C.

nom. *Lord Chichester v. Corentry*, L. R. 2 H. L. 72; *Glover v. Hartcup*, 34 Beav. 74; *Campbell v. Campbell*, L. R. 1 Eq. 383; *Paget v. Grenfell*, L. R. 6 Eq. 7; *Russell v. St. Aubyn*, L. R. 2 Ch. D. 398; *Bennett v. Houldsworth*, L. R. 6 Ch. D. 671; *In re Tussaud's Estate*, L. R. 9 Ch. D. (Ap.) 363.

(b) 2 Rep. Leg. by White. 1098.

favour of the husband, it may be a satisfaction of the husband's life interest under the settlement, but not of the interest of the wife and children (a). **3463.**

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[A sum secured by bond in favour of a natural child, has been declared to be satisfied by a share of the capital of a partnership, the value of which share, according to the articles of partnership, was estimated at a much larger sum (b).] **3464.**

A gift to children by the will of a person, or a covenant by him to divide property among them, is not within the words "an advancement or payment" by him in his lifetime, in a proviso as to satisfaction of their portions (c). **3465.**

II. Where a parent or other person standing in loco parentis bequeaths to his own or to his relation's child a legacy, whether particular or residuary, and afterwards, by an act inter vivos, makes a provision for the same child, of equal or greater amount, of equal certainty, and substantially the same in kind and in degree of benefit without expressing it to be in lieu of the legacy, or for other objects than those for which the legacy was given, in such case, in the absence of evidence to the contrary, it will be deemed a satisfaction or ademption of the legacy. And if the provision inter vivos is less than the legacy, it will be deemed an ademption pro tanto (d). And the confirmation of a will by a codicil does not revive a legacy

II. As to  
portions left  
by will.

(a) *McCrogher v. Whieldon*, L. R. 3 Eq. 236.

(b) *In re Laves, Laves v. Laves*, L. R. 20 Ch. D. (Ap.) 81.

(c) *Cooper v. Cooper*, L. R. 8 Ch. Ap. 813.

(d) Story's Eq. Jur. § 1111. and note, and 1112, 1113, 1115, 1103—1105; 2 Spence's Eq. Jur. 429, 432—435, 438—440; 1 Rep. Leg. by White, 375—379; *Hopwood v. Hop-*

*wood*, 22 Beav. 488; 7 H. L. Cas. 728; *Schofield v. Heap*, 27 Beav. 93; *Beckton v. Barton*, 27 Beav. 99; *Montefiore v. Guedalla*, 1 D. F. & J. 93; *Watson v. Watson*, 33 Beav. 575; *Phillips v. Phillips*, 34 Beav. 19; *Dawson v. Dawson*, L. R. 4 Eq. 504; *Nevin v. Drysdale*, L. R. 4 Eq. 517; *Cooper v. MacDonald*, L. R. 16 Eq. 258; *Stenson v. Maxson*, L. R. 17 Eq. 78.

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adeemed by an act inter vivos in the interval between the will and the codicil (*a*). **3466.**

A legacy may be adeemed by a gift, though not made on marriage, or on any other occasion having a special reference to the donee (*b*). **3467.**

In the case of a provision by will, followed by a provision by deed, the first being revocable, there is no difficulty in the way of the second provision taking effect in lieu of the first; and no election on the part of the person to be benefited is required. And if the second provision is construed to be substitutional, it is properly termed an ademption. **3468.**

On the other hand, in the case of a provision by deed, followed by a provision by will, the first being not revocable, and actual rights being conferred thereby, it is more natural in one respect to regard the second provision as additional rather than as substitutional; and the application of the presumption against double portions is consequently more difficult: and indeed no substitutional effect can be given to the will, except by the election of the person intended to be benefited (*c*). **3469.**

But a bequest to a daughter is not adeemed by a gift to her husband; nor by an advance to her on her marriage for an outfit (*d*). **3470.**

No ademption of legacies to wives or strangers.

And this doctrine of the constructive ademption of legacies has never been applied to legacies to wives or to mere strangers, unless under some peculiar circumstances; as where the legacy is bequeathed for a particular purpose, and a portion is afterwards given by the testator, by an act inter vivos, exactly for the same purpose, and for none

(*a*) *Montague v. Montague*, 15 Beav. 565.

(*b*) *Leighton v. Leighton*, L. R. 18 Eq. 458.

(*c*) *Lord Chichester v. Corentry*, L. R. 2 H. L. 72; *Atkinson v.*

*Littlewood*, L. R. 18 Eq. 595; *In re Tussaud's Estate*, L. R. 9 Ch. D. (Ap.) 363, 380.

(*d*) *Ravenscroft v. Jones*, 32 Beav. 669; *Cooper v. MacDonald*, L. R. 16 Eq. 258.



other, and there is no evidence of an intention to give a double portion (*a*). Indeed, in the case of strangers, the onus probandi is upon those who contend that the two provisions are to be considered but as one: whereas, in the case of children, the onus probandi is on those who contend for the double provision (*b*). The term "strangers" here includes all who are not legitimate children of the donor, or children to whom he has placed himself in loco parentis (*c*). **3471.**

PART IV.  
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III. A legacy given to a creditor, if it is of an amount equal to, or greater than, the debt, and in other respects equally beneficial, will, in general, in the absence of all countervailing circumstances, be deemed to be a satisfaction of the debt, on the principle that a testator shall be presumed to be just before he is generous (*d*). But this principle has no application to cases where the testator expressly directs his debts to be paid, and his assets are sufficient to pay both debts and legacies. And the Court leans very strongly against holding the legacy to be a satisfaction (*e*); so that the rule is not allowed to prevail where the legacy is of less amount than the debt, even as a satisfaction pro tanto, unless the creditor have, in the debtor's lifetime, assented to such an arrangement; nor where there is a difference in the time of payment of the debt and of the legacy; nor where they are of a different nature as to the subject-matter or as to the interest therein; nor where a particular motive is assigned for the gift; nor where the debt is contracted subsequently to

III. As to  
legacies to  
creditors.

(*a*) Story's Eq. Jur. § 1117, 1118, 1100, note; 2 Spence's Eq. Jur. 430; 1 Rep. Leg. by White, 382; *Pankhurst v. Howell*, L. R. 6 Ch. Ap. 136.

(*b*) 2 Spence's Eq. Jur. 430; 1 Rep. Leg. by White, 382.

(*c*) Story's Eq. Jur. § 1116; 2 Spence's Eq. Jur. 429; 1 Rep. Leg. by White, 380.

(*d*) Story's Eq. Jur. § 1119, 1120; 2 Spence's Eq. Jur. 605—607; 2 Rep. Leg. by White, 1028; *Edmunds v. Lowe*, 3 K. & J. 318; *Shadbolt v. Vanderplank*, 29 Beav. 405; *Atkinson v. Littlewood*, L. R. 18 Eq. 595.

(*e*) 2 Rep. Leg. 1050; *Hassell v. Hawkins*, 4 Drew. 468; *Cole v. Willard*, 25 Beav. 568.

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the will ; nor where the legacy is contingent or uncertain ; nor where the bequest is of a residue ; nor where the debt is a negotiable security ; nor where the debt is on an open and running account, so that the testator might not know whether he owed anything. And as to a debt strictly so called, there is no difference whether it is a debt due to a stranger, or to a wife or a child (*a*). 3472.

IV. As to  
legacies to  
debtors.

IV. On the other hand, where a creditor leaves a legacy to his debtor, and either takes no notice of the debt, or leaves his intention doubtful, Courts of Equity will not deem the legacy as either necessarily or *primâ facie* manifesting an intention to release or extinguish the debt ; but they will require some evidence, either on the face of the will, or aliunde, to establish such an intention (*b*). For, if the legacy is less than the debt, it would clearly be a positive injury to the creditor to construe the legacy a release of the debt ; and even if the legacy is more than the debt, it does not follow that because the testator has manifested his bounty towards the debtor in that respect, he intends the debtor to have another benefit which has no necessary connection with the former. Where the testator does not mention the debt, but gives the debtor a legacy of equal or greater amount, he thereby benefits the debtor to at least the same extent, by giving him the means of paying the debt, as if he had directly forgiven the debt, but had given the debtor nothing, or nothing but the overplus ; and his reason for thus giving the debtor the means of paying the debt, without alluding to the debt, may have been one of kind consideration towards the debtor, namely, in order that none but the executor might be aware of the debt. 3473.

(*a*) Story's Eq. Jur. § 1103, 1122 ; *Hammond v. Smith*, 33 Beav. 452 ;  
2 Spence's Eq. Jur. 605—608 ; 2 *Fairer v. Park*, L. R. 3 Ch. D.  
Rep. Leg. by White, 1030, 1032, 309.  
1040, 1044, 1045, 1048, 1049, 1051 ; (*b*) Story's Eq. Jur. § 1123 ; 2:  
*Jefferies v. Michell*, 20 Beav. 15 ; Rep. Leg. by White, 1064.

V. Where an annuity to the separate use of a married woman is charged on an estate, the gift of an annuity to her generally, and charged upon property of a different nature, though to the same amount, and payable on the same days, is not a satisfaction (*a*). And where a person executes a deed, by which he gives annuities to certain others, and then executes another deed by which he gives other annuities to those persons, there is no presumption that the latter were intended to be a substitute for the former, especially where the annuities given by the second deed are of less amount, or the first deed contains a power of revocation which is not exercised by the second deed (*b*). **3474.**

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T. 2, CH. 5.  
V. Annuity.

Where there is a covenant on marriage to settle specific lands, it will not generally be satisfied by suffering other lands of equal value to descend (*c*). And a covenant to bequeath a sum of money is not satisfied by an appointment of a like sum (*d*). **3475.**

Covenant to  
settle lands.

Covenant to  
bequeath a  
sum of  
money.

(*a*) 2 Spence's Eq. Jur. 609.

(*b*) *Palmer v. Newell*, 20 Beav. 32; 8 D. M. & G. 74.

(*c*) 2 Spence's Eq. Jur. 610.

(*d*) *Graham v. Wickham* (No. 1),

31 Beav. 447; 1 D. J. & S. 474.

But in connection with this, see

*Thicker v. Kry*, L. R. 8 E. 1. 493.



## APPENDIX.

### 37 & 38 VICT. c. 57 (*The Real Property Limitation Act, 1874*).

*An Act for the further Limitation of Actions and Suits relating to Real Property.*  
[7th August, 1874.]

Whereas it is expedient further to limit the times within which actions or suits may be brought for the recovery of land or rent, and of charges thereon: 37 & 38 VICT.  
c. 57.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. After the commencement of this Act no person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same. No land or rent to be recovered but within twelve years after the right of action accrued.

2. A right to make an entry or distress, or to bring an action or suit, to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion or remainder, or other future estate or interest, at the time at which the same shall have become an estate or interest in possession, by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land or rent, or some person through whom he claims, shall at any time previously to the creation of the estate or estates which shall have determined, have been in the possession or receipt of the profits of such land, or in receipt of such rent: But if the person last entitled to any particular estate on which any future estate or interest was expectant shall not have been in the possession or receipt of the profits of such land, or in receipt of such rent, at the time when his interest determined, no such entry or distress shall be made, and no such action or suit shall be brought by any person becoming entitled in possession to a future estate or interest, but within twelve years next after the time when the right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the person whose interest shall have so determined, or within six years next after the time when the estate of the person becoming entitled in possession shall have become vested in possession, whichever of those two periods shall be the longer: and if the right of any such person to make such entry or distress, or to bring any such action or suit, shall have been barred under this Act, no person afterwards claiming to be entitled to the same land or rent in respect of any subsequent estate or interest under any deed, will, or settle- Provision for case of future estates.  
  
Time limited to six years when person entitled to the particular estate out of possession, etc.



## APPENDIX.

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37 & 38 VICT.  
c. 57.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

1. After the commencement of this Act no person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims ; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same.

No land or rent to be recovered but within twelve years after the right of action accrued.

2. A right to make an entry or distress, or to bring an action or suit, to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion or remainder, or other future estate or interest, at the time at which the same shall have become an estate or interest in possession, by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land or rent, or some person through whom he claims, shall at any time previously to the creation of the estate or estates which shall have determined, have been in the possession or receipt of the profits of such land, or in receipt of such rent : But if the person last entitled to any particular estate on which any future estate or interest was expectant shall not have been in the possession or receipt of the profits of such land, or in receipt of such rent, at the time when his interest determined, no such entry or distress shall be made, and no such action or suit shall be brought by any person becoming entitled in possession to a future estate or interest, but within twelve years next after the time when the right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the person whose interest shall have so determined, or within six years next after the time when the estate of the person becoming entitled in possession shall have become vested in possession, whichever of those two periods shall be the longer ; and if the right of any such person to make such entry or distress, or to bring any such action or suit, shall have been barred under this Act, no person afterwards claiming to be entitled to the same land or rent in respect of any subsequent estate or interest under any deed, will, or settle-

Provision for case of future estates.

Time limited to six years when person entitled to the particular estate out of possession, etc.

37 & 38 VICT.  
C. 57.

In cases of  
infancy,  
coverture, or  
lunacy at  
the time  
when the  
right of ac-  
tion accrues,  
then six  
years to be  
allowed  
from the ter-  
mination of  
the disabili-  
ty or pre-  
vious death.

No time to  
be allowed  
for absence  
beyond seas.

Thirty years  
utmost al-  
lowance for  
disabilities.

In case of  
possession  
under an  
assurance by  
a tenant in  
tail, which  
shall not  
bar the re-  
mainders,  
they shall be  
barred at  
the end of  
twelve years  
after that  
period, at  
which the  
assurance, if  
then exe-  
cuted,  
would have  
barred them.

Mortgagor  
to be barred  
at end of  
twelve years  
from the  
time when  
the mortga-  
gee took  
possession  
or from the  
last written

ment, executed or taking effect after the time when a right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the owner of the particular estate whose interest shall have so determined as aforesaid, shall make any such entry or distress, or bring any such action or suit, to recover such land or rent.

3. If at the time at which the right of any person to make an entry or distress, or to bring an action or suit, to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned, (that is to say,) infancy, coverture, idiotcy, lunacy, or unsoundness of mind, then such person, or the person claiming through him, may, notwithstanding the period of twelve years, or six years (as the case may be), hereinbefore limited shall have expired, make an entry or distress, or bring an action or suit, to recover such land or rent, at any time within six years next after the time at which the person to whom such right shall first have accrued shall have ceased to be under any such disability, or shall have died (whichever of those two events shall have first happened).

4. The time within which any such entry may be made, or any such action or suit may be brought as aforesaid, shall not in any case after the commencement of this Act be extended or enlarged by reason of the absence beyond seas during all or any part of that time of the person having the right to make such entry, or to bring such action or suit, or of any person through whom he claims.

5. No entry, distress, action, or suit shall be made or brought by any person who at the time at which his right to make any entry or distress, or to bring an action or suit, to recover any land or rent, shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within thirty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such thirty years, or although the term of six years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired.

6. When a tenant in tail of any land or rent shall have made an assurance thereof which shall not operate to bar the estate or estates to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person or any other person whosoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail) shall continue or be in such possession or receipt for the period of twelve years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then, at the expiration of such period of twelve years, such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail.

7. When a mortgagee shall have obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage but within twelve years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor, or of his right to redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee or the person claiming



through him ; and in such case no such action or suit shall be brought but within twelve years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given ; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons ; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money or land or rent by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent ; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.

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c. 57.

acknowledgment.

8. No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent ; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given.

Money charged upon land and legacies to be deemed satisfied at the end of twelve years if no interest paid nor acknowledgment given in writing in the meantime.

9. From and after the commencement of this Act all the provisions of the Act passed in the session of the third and fourth years of the reign of his late Majesty King William the Fourth, chapter twenty-seven, except those contained in the several sections thereof next hereinafter mentioned shall remain in full force, and shall be construed together with this Act, and shall take effect as if the provisions hereinbefore contained were substituted in such Act for the provisions contained in the sections thereof numbered two, five, sixteen, seventeen, twenty-three, twenty-eight, and forty respectively (which several sections, from and after the commencement of this Act, shall be repealed), and as if the term of six years had been mentioned, instead of the term of ten years, in the section of the said Act numbered eighteen, and the period of twelve years had been mentioned in the said section eighteen instead of the period of twenty years ; and the provisions of the Act passed in the session of the seventh year of the reign of his late Majesty King William the Fourth, and the first year of the reign of her present Majesty, chapter twenty-eight, shall remain in full force, and be construed together with this Act, as if the period of twelve years had been therein mentioned instead of the period of twenty years.

Act to be read with 3 & 4 W. 4, c. 27, of which certain parts are repealed, and other parts to be read in reference to alteration by this Act.

7 W. 4 & 1 Vict. c. 28 to be read with this Act.

10. After the commencement of this Act no action, suit, or other pro- Time for

37 & 38 VICT.  
c. 57.

recovering  
charges and  
arrears of  
interest not  
to be en-  
larged by  
express  
trusts for  
raising  
same.

Short title.  
Commence-  
ment of Act.

ceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust.

11. This Act may be cited as the "Real Property Limitation Act, 1874."

12. This Act shall commence and come into operation on the first day of January one thousand eight hundred and seventy-nine.

### 37 & 38 VICT. c. 78 (*The Vendor and Purchaser Act, 1874*).

*An Act to amend the Law of Vendor and Purchaser, and further to simplify Title to Land.*  
[7th August, 1874.]

37 & 38 VICT.  
c. 78.

Whereas it is expedient to facilitate the transfer of land by means of certain amendments in the law of vendor and purchaser:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Forty years  
substituted  
for sixty  
years as the  
root of title.

1. In the completion of any contract of sale of land made after the thirty-first day of December one thousand eight hundred and seventy-four, and subject to any stipulation to the contrary in the contract, forty years shall be substituted as the period of commencement of title which a purchaser may require in place of sixty years, the present period of such commencement; nevertheless earlier title than forty years may be required in cases similar to those in which earlier title than sixty years may now be required.

Rules for  
regulating  
obligations  
and rights  
of vendor  
and pur-  
chaser.

2. In the completion of any such contract as aforesaid, and subject to any stipulation to the contrary in the contract, the obligations and rights of vendor and purchaser shall be regulated by the following rules; that is to say,

First. Under a contract to grant, or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold.

Second. Recitals, statements, and descriptions, of facts, matters, and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions (a).

Third. The inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title shall not be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents.

Fourth. Such covenants for production as the purchaser can and shall require shall be furnished at his expense, and the vendor shall bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser.

Fifth. Where the vendor retains any part of an estate to which any documents of title relate he shall be entitled to retain such documents.

Trustees  
may sell, etc.,  
notwith-  
standing  
rules.

3. Trustees who are either vendors or purchasers may sell or buy without excluding the application of the second section of this Act.

4. The legal personal representative of a mortgagee of a freehold estate,

(a) See *Bolton v. London School Board*, L. R. 7 Ch. D. 766.

or of a copyhold estate to which the mortgagee shall have been admitted, may, on payment of all sums secured by the mortgage, convey or surrender the mortgaged estate, whether the mortgage be in form an assurance subject to redemption, or an assurance upon trust (a).

5. Upon the death of a bare trustee of any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, such hereditament shall vest like a chattel real in the legal personal representative from time to time of such trustee (b).

6. When any freehold or copyhold hereditament shall be vested in a married woman as a bare trustee, she may convey or surrender the same as if she were a femme sole.

7. After the commencement of this Act, no priority or protection shall be given or allowed to any estate, right, or interest in land by reason of such estate, right, or interest being protected by or tacked to any legal or other estate or interest in such land; and full effect shall be given in every Court to this provision, although the person claiming such priority or protection as aforesaid shall claim as a purchaser for valuable consideration and without notice: Provided always, that this section shall not take away from any estate, right, title, or interest any priority or protection which but for this section would have been given or allowed thereto as against any estate or interest existing before the commencement of this Act (c).

8. Where the will of a testator devising land in Middlesex or Yorkshire has not been registered within the period allowed by law in that behalf, an assurance of such land to a purchaser or mortgagee by the devisee or by some one deriving title under him shall, if registered before, take precedence of and prevail over any assurance from the testator's heir at law.

9. A vendor or purchaser of real or leasehold estate in England, or their representatives respectively, may at any time or times and from time to time apply in a summary way to a judge of the Court of Chancery in England in chambers, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract), and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

A vendor or purchaser of real or leasehold estate in Ireland, or their representatives respectively, may in like manner and for the same purpose apply to a judge of the Court of Chancery in Ireland, and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

10. This Act shall not apply to Scotland, and may be cited as the "Vendor and Purchaser Act, 1874."

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c. 78.

Legal personal representative may convey legal estate of mortgaged property.

Bare legal estate in fee simple to vest in executor or administrator.

Married woman who is a bare trustee may convey, etc.

Protection and priority by legal estates and tacking not to be allowed.

Non-registration of will in Middlesex, etc., cured in certain cases.

Vendor or purchaser may obtain decision of judge in chambers as to requisitions or objections or compensation, etc.

Extent of Act.

## 40 & 41 VICT. C. 18 (*The Settled Estates Act, 1877*).

*An Act to consolidate and amend the Law relating to Leases and Sales of Settled Estates.*

[28th June, 1877.]

Whereas it is expedient to consolidate and amend the law relating to leases and sales of settled estates:

Be it enacted by the Queen's most Excellent Majesty, by and with the

(a) Repealed as to deaths after 31st Dec., 1881, by stat. 44 & 45 Vict. c. 41, s. 30, Appendix, p. 1434.

(b) Repealed as to England by stat. 38 & 39 Vict. c. 87, s. 48, which was in turn repealed by stat. 44 & 45 Vict. c. 41,

s. 30, Appendix, p. 1434; and as to Ireland, as regards deaths, after 31st Dec., 1881, by s. 73 of the last-mentioned statute.

(c) Repealed by stat. 38 & 39 Vict. c. 87, s. 189.

40 & 41 VICT.  
c. 18.

40 & 41 Vict.  
c. 18.

advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:—

Short title.

1. This Act may be cited for all purposes as “The Settled Estates Act, 1877.”

Interpreta-  
tion of  
“settle-  
ment” and  
“settled  
estates.”

2. The word “settlement” as used in this Act shall signify any Act of Parliament, deed, agreement, copy of court roll, will, or other instrument, or any number of such instruments, under or by virtue of which any hereditaments of any tenure or any estates or interests in any such hereditaments stand limited to or in trust for any persons by way of succession, including any such instruments affecting the estates of any one or more of such persons exclusively.

The term “settled estates” as used in this Act shall signify all hereditaments of any tenure, and all estates or interests in any such hereditaments, which are the subject of a settlement; and for the purposes of this Act a tenant in tail after possibility of issue extinct shall be deemed to be a tenant for life.

All estates or interests in remainder or reversion not disposed of by the settlement, and reverting to a settlor or descending to the heir of a testator, shall be deemed to be estates coming to such settlor or heir under or by virtue of the settlement.

In determining what are settled estates within the meaning of this Act, the Court shall be governed by the state of facts, and by the trusts or limitations of the settlement at the time of the said settlement taking effect.

Interpreta-  
tion of “the  
Court.”

3. The expression “the Court” in this Act shall, so far as relates to estates in England, mean the High Court of Justice, and all causes and matters in respect of such estates commenced or continued under this Act, shall, subject to the provisions of the Judicature Acts, be assigned to the Chancery Division of the High Court of Justice in like manner as if such causes and matters had arisen under an Act of Parliament by which, prior to the passing of the Judicature Acts, exclusive jurisdiction in respect to such causes and matters had been given to the Court of Chancery or to any judges or judge thereof respectively.

The expression “the Court” in this Act shall, so far as relates to estates in Ireland, mean the Court of Chancery in Ireland.

Power to  
authorise  
leases of  
settled  
estates.

4. It shall be lawful for the Court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this Act contained, to authorise leases of any settled estates, or of any rights or privileges over or affecting any settled estates, for any purpose whatsoever, whether involving waste or not, provided the following conditions be observed:

First. Every such lease shall be made to take effect in possession at or within one year next after the making thereof, and shall be for a term of years not exceeding for an agricultural or occupation lease, so far as relates to estates in England twenty-one years, or so far as relates to estates in Ireland thirty-five years, and for a mining lease or a lease of water mills, way leaves, water leaves, or other rights or easements forty years, and for repairing lease sixty years, and for a building lease ninety-nine years: Provided always, that any such lease (except an agricultural lease) may be for such term of years as the Court shall direct, where the Court shall be satisfied that it is the usual custom of the district and beneficial to the inheritance to grant such a lease for a longer term than the term hereinbefore specified in that behalf:

Secondly. On every such lease shall be reserved the best rent or reservation in the nature of rent, either uniform or not, that can be reasonably obtained, to be made payable half-yearly or oftener without taking any fine or other benefit in the nature of a fine: Pro-

vided always, that in the case of a mining lease, a repairing lease, or a building lease a peppercorn rent or any smaller rent than the rent to be ultimately made payable may, if the Court shall think fit so to direct, be made payable during all or any part of the first five years of the term of the lease:

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Thirdly. Where the lease is of an earth, coal, stone, or mineral, a certain portion of the whole rent or payment reserved shall be from time to time set aside and invested as hereinafter mentioned, namely, when and so long as the person for the time being entitled to the receipt of such rent is a person who by reason of his estate or by virtue of any declaration in the settlement is entitled to work such earth, coal, stone, or mineral for his own benefit, one-fourth part of such rent, and otherwise three-fourth parts thereof; and in every such lease sufficient provision shall be made to ensure such application of the aforesaid portion of the rent by the appointment of trustees or otherwise as the Court shall deem expedient:

Fourthly. No such lease shall authorise the felling of any trees except so far as shall be necessary for the purpose of clearing the ground for any buildings, excavations, or other works authorised by the lease:

Fifthly. Every such lease shall be by deed, and the lessee shall execute a counterpart thereof, and every such lease shall contain a condition for re-entry on non-payment of the rent for a period of twenty-eight days after it becomes due, or for some less period to be specified in that behalf.

5. Subject and in addition to the conditions hereinbefore mentioned, every such lease shall contain such covenants, conditions, and stipulations as the Court shall deem expedient with reference to the special circumstances of the demise.

Leases may contain special covenants.

6. The power to authorise leases conferred by this Act shall extend to authorise leases either of the whole or any parts of the settled estates, and may be exercised from time to time.

Parts of settled estates may be leased.

7. Any leases, whether granted in pursuance of this Act or otherwise, may be surrendered either for the purpose of obtaining a renewal of the same or not, and the power to authorise leases conferred by this Act shall extend to authorise new leases of the whole or any part of the hereditaments comprised in any surrendered lease.

Leases may be surrendered and renewed.

8. The power to authorise leases conferred by this Act shall extend to authorise preliminary contracts to grant any such leases, and any of the terms of such contracts may be varied in the leases.

Power to authorise leases to extend to preliminary contracts.

9. All the powers to authorise and to grant leases contained in this Act shall be deemed to include respectively powers to authorise the lords of settled manors and powers to the lords of settled manors to give licences to their copyhold or customary tenants to grant leases of lands held by them of such manors to the same extent and for the same purposes as leases may be authorised or granted of freehold hereditaments under this Act.

Powers of leasing to include powers to lords of settled manors to give licences to their copyhold or customary tenants to grant leases.

10. The power to authorise leases conferred by this Act may be exercised by the Court either by approving of particular leases or by ordering that powers of leasing, in conformity with the provisions of this Act, shall be vested in trustees in manner hereinafter mentioned.

11. When application is made to the Court either to approve of a particular lease or to vest any powers of leasing in trustees, the Court shall require the applicant to produce such evidence as it shall deem sufficient to enable it to ascertain the nature, value, and circumstances of the estate, and the terms and conditions on which leases thereof ought to be authorised.

Mode in which leases may be authorised.

12. When a particular lease or contract for a lease has been approved by the Court, the Court shall direct what person or persons shall execute the same as lessor; and the lease or contract executed by such person or

What evidence to be produced on an application to authorise leases.



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After approval of a lease, Court to direct who shall be the lessor.

Powers of leasing may be vested in trustees.

Conditions that leases be settled by the Court not to be inserted in orders made under this Act.

Conditions where inserted may be struck out.

Court may authorise sales of settled estates and of timber.

Proceedings for protection.

persons shall take effect in all respects as if he or they was or were at the time of the execution thereof absolutely entitled to the whole estate or interest which is bound by the settlement, and had immediately afterwards settled the same according to the settlement, and so as to operate (if necessary) by way of revocation and appointment of the use or otherwise as the Court shall direct.

13. Where the Court shall deem it expedient that any general powers of leasing any settled estates conformably to this Act should be vested in trustees, it may by order vest any such power accordingly either in the existing trustees of the settlement or in any other persons, and such powers, when exercised by such trustees, shall take effect in all respects as if the power so vested in them had been originally contained in the settlement, and so as to operate (if necessary) by way of revocation and appointment of the use or otherwise, as the Court shall direct; and in every such case the Court, if it shall think fit, may impose any conditions as to consents or otherwise on the exercise of such power, and the Court may also authorise the insertion of provisions for the appointment of new trustees from time to time for the purpose of exercising such powers of leasing as aforesaid.

14. Provided always, that in orders under this Act for vesting any powers of leasing in any trustees or other persons, no conditions shall be inserted requiring that the leases thereby authorised should be submitted to or be settled by the Court or a judge thereof, or be made conformable with a model lease deposited in the judge's chambers, save only in any case in which the parties applying for the order may desire to have any such condition inserted, or in which it shall appear to the Court that there is some special reason rendering the insertion of such a condition necessary or expedient.

15. Provided also, that in all cases of orders (whether under this Act or under the corresponding enactment of the Acts hereby repealed) in which any such condition as last aforesaid shall have been inserted, it shall be lawful for any party interested to apply to the Court to alter and amend such order by striking out such condition, and the Court shall have full power to alter the same accordingly, and the order so altered shall have the same validity as if it had originally been made in its altered state; but nothing herein contained shall make it obligatory on the Court to act under this provision in any case in which from the evidence which was before it when the order sought to be altered was made, or from any other evidence, it shall appear to the Court that there is any special reason why in the case in question such a condition is necessary or expedient.

16. It shall be lawful for the Court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this Act contained, from time to time to authorise a sale of the whole or any parts of any settled estates or of any timber (not being ornamental timber) growing on any settled estates, and every such sale shall be conducted and confirmed in the same manner as by the rules and practice of the Court for the time being is or shall be required in the sale of lands sold under a decree of the Court.

17. It shall be lawful for the Court, if it shall deem it proper and consistent with a due regard for the interests of all parties who are or may hereafter be entitled under the settlement, and subject to the provisions and restrictions in this Act contained, to sanction any action, defence, petition to Parliament, parliamentary opposition, or other proceedings appearing to the Court necessary for the protection of any settled estate, and to order that all or any part of the costs and expenses in relation thereto be raised and paid by means of a sale or mortgage of or charge upon all or any part of the settled estate, or be raised and paid out of the rents and profits of the settled estate, or out of any moneys or investments

representing moneys liable to be laid out in the purchase of hereditaments to be settled in the same manner as the settled estate, or out of the income of such moneys or investments, or out of any accumulations of rents, profits, or income (*a*).

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c. 18.

18. When any land is sold for building purposes it shall be lawful for the Court, if it shall see fit, to allow the whole or any part of the consideration to be a rent issuing out of such land, which may be secured and settled in such manner as the Court shall approve.

Consideration for land sold for building may be a fee-farm rent.

19. On any sale of land any earth, coal, stone, or mineral may be excepted, and any rights or privileges may be reserved and the purchaser may be required to enter into any covenants or submit to any restrictions which the Court may deem advisable.

Minerals, etc., may be excepted from sales.

20. It shall be lawful for the Court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this Act contained, from time to time to direct that any part of any settled estates be laid out for streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses, either to be dedicated to the public or not; and the Court may direct that the parts so laid out shall remain vested in the trustees of the settlement, or be conveyed to or vested in any other trustees upon such trusts for securing the continued appropriation thereof to the purposes aforesaid in all respects, and with such provisions for the appointment of new trustees when required, as by the Court shall be deemed advisable.

Court may authorise dedication of any part of settled estates for streets, roads, and other works.

21. Where any part of any settled estates is directed to be laid out for such purposes as aforesaid, the Court may direct that any such streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses, including all necessary or proper fences, pavings, connections, and other works incidental thereto respectively, be made and executed, and that all or any part of the expenses in relation to such laying out and making and execution be raised and paid by means of a sale or mortgage of or charge upon all or any part of the settled estates, or be raised and paid out of the rents and profits of the settled estates or any part thereof, or out of any moneys or investments representing moneys liable to be laid out in the purchase of hereditaments to be settled in the same manner as the settled estates, or out of the income of such moneys or investments, or out of any accumulations of rents, profits, or income; and the Court may also give such directions as it may deem advisable for any repair or maintenance of any such streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses, or other works, out of any such rents, profits, income, or accumulations during such period or periods of time as to the Court shall seem advisable.

As to laying out and making and executing and maintaining streets, roads, and other works and expenses thereof.

22. On every sale or dedication to be effected as hereinbefore mentioned the Court may direct what person or persons shall execute the deed of conveyance; and the deed executed by such person or persons shall take effect as if the settlement had contained a power enabling such person or persons to effect such sale or dedication, and so as to operate (if necessary) by way of revocation and appointment of the use or otherwise, as the Court shall direct.

How sales and dedications are to be effected under the direction of the Court.

23. Any person entitled to the possession or to the receipt of the rents and profits of any settled estates for a term of years determinable on his death, or for an estate for life or any greater estate, and also any person entitled to the possession or to the receipt of the rents and profits of any settled estates as the assignee of any person who but for such assignment would be entitled to such estates for a term of years determinable with any life, or for an estate for any life or any greater estate, may apply to the Court by petition in a summary way to exercise the powers conferred by this Act.

Application by petition to exercise powers conferred by this Act.

(*a*) Repealed by the stat. 45 & 46 Vict. c. 38, s. 64, Appendix, p. 1475

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c. 18.

With whose  
consent such  
application  
to be made.

Court may  
dispense  
with con-  
sent in  
respect of  
certain  
estates.

Notice to be  
given to per-  
sons who do  
not consent  
to or concur  
in the appli-  
cation.

Court may  
dispense  
with notice  
under cer-  
tain circum-  
stances.

Court may  
dispense  
with con-  
sent, having  
regard to the  
number and  
interests of  
parties.

Petition  
may be  
granted  
without con-  
sent, saving

24. Subject to the exceptions hereinafter contained, every application to the Court must be made with the concurrence or consent of the following parties; namely,

Where there is a tenant in tail under the settlement in existence and of full age, then the parties to concur or consent shall be such tenant in tail, or if there is more than one such tenant in tail, then the first of such tenants in tail and all persons in existence having any beneficial estate or interest under or by virtue of the settlement prior to the estate of such tenant in tail, and all trustees having any estate or interest on behalf of any unborn child prior to the estate of such tenant in tail.

And in every other case the parties to concur or consent shall be all the persons in existence having any beneficial estate or interest under or by virtue of the settlement, and also all trustees having any estate or interest on behalf of any unborn child.

25. Provided always, that where an infant is tenant in tail under the settlement, it shall be lawful for the Court, if it shall think fit, to dispense with the concurrence or consent of the person, if only one, or all or any of the persons, if more than one, entitled, whether beneficially or otherwise, to any estate or interest subsequent to the estate tail of such infant.

26. Provided always, that where on an application under this Act the concurrence or consent of any such person as aforesaid shall not have been obtained, notice shall be given to such person in such manner as the Court to which the application shall be made shall direct, requiring him to notify within a time to be specified in such notice whether he assents to or dissents from such application, or submits his rights or interests so far as they may be affected by such application to be dealt with by the Court, and every such notice shall specify to whom and in what manner such modification is to be delivered or left. In case no notification shall be delivered or left in accordance with the notice and within the time thereby limited, the person to or for whom such notice shall have been given or left shall be deemed to have submitted his rights and interests to be dealt with by the Court.

27. Provided also, that where on an application under this Act the concurrence or consent of any such person as aforesaid shall not have been obtained, and in case such person cannot be found, or in case it shall be uncertain whether he be living or dead, or in case it shall appear to the Court that such notice as aforesaid cannot be given to such person without expense disproportionate to the value of the subject-matter of the application, then and in any such case the Court, if it shall think fit, either on the ground of the rights or interests of such person being small or remote, or being similar to the rights or interests of any other person or persons, or on any other ground, may by order dispense with notice to such person, and such person shall thereupon be deemed to have submitted his rights and interests to be dealt with by the Court.

28. An order may be made upon any application notwithstanding that the concurrence or consent of any such person as aforesaid shall not have been obtained or shall have been refused, but the Court in considering the application shall have regard to the number of persons who concur in or consent to the application, and who dissent therefrom or who submit or are to be deemed to submit their rights or interests to be dealt with by the Court, and to the estates or interests which such persons respectively have or claim to have in the estate as to which such application is made; and every order of the Court made upon such application shall have the same effect as if all such persons had been consenting parties thereto.

29. Provided nevertheless, that it shall be lawful for the Court, if it shall think fit, to give effect to any petition subject to and so as not to affect the rights, estate, or interest of any person whose concurrence or consent has been refused, or who has not submitted or is not deemed to



have submitted his rights or interests to be dealt with by the Court, or whose rights, estate, or interest ought in the opinion of the Court to be excepted. 40 & 41 Vict.  
c. 18.

30. Notice of any application to the Court under this Act shall be served on all trustees who are seised or possessed of any estate in trust for any person whose consent or concurrence to or in the application is hereby required, and on any other parties who in the opinion of the Court ought to be so served, unless the Court shall think fit to dispense with such notice. rights of  
non-con-  
senting  
parties.  
Notice of  
application  
to be served  
on all trus-  
tees, etc.

31. Notice of any application to the Court under this Act shall, if the Court shall so direct, but not otherwise, be inserted in such newspapers as the Court shall direct, and any person or body corporate, whether interested in the estate or not, may apply to the Court by motion for leave to be heard in opposition to or in support of any application which may be made to the Court under this Act; and the Court is hereby authorised to permit such person or corporation to appear and be heard in opposition to or support of any such application, on such terms as to costs or otherwise, and in such manner, as it shall think fit. Notice of  
application  
to be given  
in news-  
papers if  
Court direct.

32. The Court shall not be at liberty to grant any application under this Act in any case where the applicant, or any party entitled, has previously applied to either house of parliament for a private Act to effect the same or a similar object, and such application has been rejected on its merits, or reported against by the judges to whom the bill may have been referred. No applica-  
tion under  
this Act to  
be granted  
where a  
similar ap-  
plication has  
been re-  
jected by  
Parliament.

33. The Court shall direct that some sufficient notice of any exercise of any of the powers conferred on it by this Act shall be placed on the settlement or on any copies thereof, or otherwise recorded in any way it may think proper, in all cases where it shall appear to the Court to be practicable and expedient for preventing fraud or mistake. Notice of  
the exercise  
of powers to  
be given as  
directed by  
the Court.

34. All money to be received on any sale effected under the authority of this Act, or to be set aside out of the rent or payments reserved on any lease of earth, coal, stone, or minerals as aforesaid, may, if the Court shall think fit, be paid to any trustees of whom it shall approve, or otherwise the same, so far as relates to estates in England, shall be paid into Court ex parte the applicant in the matter of this Act, and so far as relates to estates in Ireland, shall be paid into the Bank of Ireland to the account of the accountant-general ex parte the applicant in the matter of this Act; and such money shall be applied as the Court shall from time to time direct to some one or more of the following purposes, namely,— Payment  
and applica-  
tion of  
moneys  
arising from  
sales or set  
aside out of  
rent, etc.,  
reserved on  
mining  
leases.

So far as relates to estates in England the purchase or redemption of the land tax, and so far as relates to estates in Ireland the purchase or redemption of rent charge in lieu of tithes, Crown rent, or quit rent.

The discharge or redemption of any incumbrance affecting the hereditaments in respect of which such money was paid, or affecting any other hereditaments subject to the same uses or trusts; or

The purchase of other hereditaments to be settled in the same manner as the hereditaments in respect of which the money was paid; or

The payment to any person becoming absolutely entitled.

35. The application of the money in manner aforesaid may, if the Court shall so direct, be made by the trustees (if any) without any application to the Court, or otherwise upon an order of the Court upon the petition of the person who would be entitled to the possession or the receipt of the rents and profits of the land if the money had been invested in the purchase of land. Trustees  
may apply  
moneys in  
certain cases  
without ap-  
plication to  
Court.

36. Until the money can be applied as aforesaid, the same shall be invested as the Court shall direct in some or one of the investments in which cash under the control of the Court is for the time being authorised to be invested, and the interest and dividends of such investments shall be paid to the person who would have been entitled to the rents and profits of the land if the money had been invested in the purchase of land. Until money  
can be ap-  
plied to be  
invested,  
and divi-  
dends to be  
paid to  
parties en-  
titled.

37. Where any purchase money paid into Court under the provisions

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c. 18.

Court may direct application of money in respect of leases or reversions as may appear just.

Court may exercise powers repeatedly, but may not exercise them if expressly negatived.

Court not to authorise any act which could not have been authorised by the settlor.

Acts of the Court in professed pursuance of this Act not to be invalidated.

Costs.

Rules and orders.

of this Act shall have been paid in respect of any lease for a life or lives or years, or for a life or lives and years, or any estate in lands less than the whole fee simple thereof, or of any reversion dependent on any such lease or estate, it shall be lawful for the Court on the petition of any party interested in such money to order that the same shall be laid out, invested, accumulated, and paid in such manner as the said Court may consider will give to the parties interested in such money the same benefit therefrom as they might lawfully have had from the lease, estate, or reversion in respect of which such money shall have been paid, or as near thereto as may be.

38. The Court shall be at liberty to exercise any of the powers conferred on it by this Act, whether the Court shall have already exercised any of the powers conferred by this Act in respect of the same property or not; but no such powers shall be exercised if an express declaration that they shall not be exercised is contained in the settlement: Provided always, that the circumstance of the settlement containing powers to effect similar purposes shall not preclude the Court from exercising any of the powers conferred by this Act, if it shall think that the powers contained in the settlement ought to be extended.

39. Nothing in this Act shall be construed to empower the Court to authorise any lease, sale, or other act beyond the extent to which in the opinion of the Court the same might have been authorised in and by the settlement by the settlor or settlors.

40. After the completion of any lease or sale or other act under the authority of the Court, and purporting to be in pursuance of this Act, the same shall not be invalidated on the ground that the Court was not hereby empowered to authorise the same, except that no such lease, sale, or other act shall have any effect against such person as herein mentioned whose concurrence or consent ought to be obtained, or who ought to be served with notice, or in respect of whom an order dispensing with such service ought to be obtained in the case where such concurrence or consent has not been obtained and such service has not been made or dispensed with.

41. It shall be lawful for the Court, if it shall think fit, to order that all or any costs or expenses of all or any parties of and incident to any application under this Act shall be a charge on the hereditaments which are the subject of the application, or on any other hereditaments included in the same settlement and subject to the same limitations; and the Court may also direct that such costs and expenses shall be raised by sale or mortgage of a sufficient part of such hereditaments, or out of the rents or profits thereof, such costs and expenses to be taxed as the Court shall direct.

42. General rules and orders of Court for carrying into effect the purposes of this Act, and for regulating the times and form and mode of procedure, and generally the practice of the Court in respect of the matters to which this Act relates, and for regulating the fees and allowances to all officers and solicitors of the Court in respect of such matters, shall be made so far as relates to proceedings in England by any three or more of the following persons, of whom the Lord Chancellor shall be one, namely, the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, and four other judges of the Supreme Court of Judicature to be from time to time appointed for the purpose by the Lord Chancellor in writing under his hand, such appointment to continue for such time as shall be specified therein, and so far as relates to proceedings in Ireland by any three or more of the following persons, of whom the Lord Chancellor of Ireland shall be one, namely, the Lord Chancellor of Ireland, the Lord Chief Justice of Ireland, the Master of the Rolls in Ireland, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron, and four other judges of the superior courts in

Ireland to be from time to time appointed for the purpose by the Lord Chancellor of Ireland in writing under his hand, such appointment to continue for such time as shall be specified therein, and such rules and orders may from time to time be rescinded or altered by the like authorities respectively, and all such rules and orders shall take effect as general orders of the Court. 40 & 41 Vict.  
c. 18.

43. All general rules and orders made as aforesaid shall be laid before each House of Parliament within forty days after the making thereof if Parliament is then sitting, or if not, within forty days after the commencement of the then next ensuing session, and if an address is presented to Her Majesty by either House of Parliament within the next subsequent forty days on which the said House shall have sat, praying that any such rule or order may be annulled, Her Majesty may thereupon by order in council annul the same, and the rule or order so annulled shall thenceforth become void and of no effect, but without prejudice to the validity of any proceedings which may in the meantime have been taken under the same. Rules and  
orders to be  
laid before  
Parliament.

44. The powers vested in the High Court of Justice by this Act may, so far as relates to estates within the County Palatine of Lancaster, be exercised also by the Court of Chancery of the said County Palatine; and general rules and orders of Court for the purposes aforesaid, so far as relates to proceedings in the said Court of the said County Palatine, shall be made by the Chancellor of the Duchy and County Palatine of Lancaster, with the advice and consent of any one or more of the persons authorised under this Act to concur in the making of general rules and orders relating to proceedings in England, and also with the advice and consent of the Vice-Chancellor of the said County Palatine. Concurrent  
jurisdiction  
of the Court  
of Chancery  
of the  
County  
Palatine of  
Lancaster.

45. It shall and may be lawful for any person who under the provisions of this Act may make an application to the Court of Chancery in Ireland for the lease or sale of a settled estate, instead of making such application to the said Court of Chancery in Ireland to apply to the Landed Estates Court, Ireland, for the purpose of having the lease or sale of such settled estate under the said last-mentioned Court; and thereupon it shall be lawful for the said Landed Estates Court, Ireland, to exercise all the powers conferred upon the Court of Chancery in Ireland in relation to leases or sales of such nature under the provisions of this Act, save that the judge in the case of a sale shall himself execute the conveyance to the purchaser under such sale, and save that such conveyance shall have the like operation and effect, and confer such indefeasible title to the purchaser as if such sale had been made and such conveyance had been executed upon an application for the sale of an incumbered estate under the Act of the twenty-first and twenty-second years of Her Majesty, chapter seventy-two: Provided always, that the Landed Estates Court, Ireland, shall make such investigation of the title and circumstances of the said estates as shall appear expedient, and also in cases of sales as in other cases preliminary to sales conducted in the said Landed Estates Court, Ireland: Provided also, that every decision and order in the course of such proceedings shall be subject to appeal to the Court of Appeal in Chancery as in other cases under the said Act. Application  
for lease or  
sale in Ire-  
land may be  
made to  
Landed Es-  
tates Court.

46. It shall be lawful for any person entitled to the possession or to the receipt of the rents and profits of any settled estates for an estate for any life, or for a term of years determinable with any life or lives, or for any greater estate, either in his own right or in right of his wife, unless the settlement shall contain an express declaration that it shall not be lawful for such person to make such demise; and also for any person entitled to the possession or to the receipt of the rents and profits of any unsettled estates as tenant by the curtesy, or in dower, or in right of a wife who is seised in fee, without any application to the Court, to demise the same or any part thereof, except the principal mansion house and the demesnes thereof, and other lands usually occupied Tenants for  
life, etc.,  
may grant  
leases for  
twenty-one  
years.

40 & 41 Vict.  
c. 18.

Against  
whom such  
leases shall  
be valid.

Evidence of  
execution of  
counterpart  
lease by  
lessee.

Provision as  
to infants,  
lunatics, etc.

A married  
woman ap-  
plying to  
the Court,  
or consent-  
ing to be  
examined  
apart from  
her hus-  
band.

Examina-  
tion of mar-  
ried woman  
how to be  
made when  
residing  
within the  
jurisdiction  
of the  
Court, and  
how when  
residing  
without  
such juris-  
diction.

As to appli-  
cation by or  
consent of  
married

therewith, from time to time, for any term not exceeding twenty-one years so far as relates to estates in England, and thirty-five years so far as relates to estates in Ireland, to take effect in possession at or within one year next after the making thereof; provided that every such demise be made by deed, and the best rent that can reasonably be obtained be thereby reserved, without any fine or other benefit in the nature of a fine, which rent shall be incident to the immediate reversion; and provided that such demise be not made without impeachment of waste, and do contain a covenant for payment of the rent, and such other usual and proper covenants as the lessor shall think fit, and also a condition of re-entry on non-payment of the rent for a period of twenty-eight days after it becomes due, or for some less period to be specified in that behalf; and provided a counterpart of every deed of lease be executed by the lessee.

47. Every demise authorised by the last preceding section shall be valid against the person granting the same, and all other persons entitled to estates subsequent to the estate of such person under or by virtue of the same settlement if the estates be settled, and in the case of unsettled estates against the wife of any husband granting such demise of estates to which he is entitled in right of such wife, and against all persons claiming through or under the wife or husband (as the case may be) of the person granting the same.

48. The execution of any lease by the lessor or lessors shall be deemed sufficient evidence that a counterpart of such lease has been duly executed by the lessee as required by this Act.

49. All powers given by this Act, and all applications to the Court under this Act, and consents to and notifications respecting such applications, may be executed, made, or given by, and all notices under this Act may be given to guardians on behalf of infants, and by or to committees on behalf of lunatics, and by or to trustees or assignees of the property of bankrupts, debtors in liquidation, or insolvents: Provided nevertheless, that in the cases of infant or lunatic tenants in tail no application to the Court or consent to or notification respecting any application may be made or given by any guardian or committee without the special direction of the Court.

50. Where a married woman shall apply to the Court, or consent to an application to the Court, under this Act, she shall first be examined apart from her husband touching her knowledge of the nature and effect of the application, and it shall be ascertained that she freely desires to make or consent to such application; and such examination shall be made whether the hereditaments which are the subject of the application shall be settled in trust for the separate use of such married woman independently of her husband or not; and no clause or provision in any settlement restraining anticipation shall prevent the Court from exercising, if it shall think fit, any of the powers given by this Act, and no such exercise shall occasion any forfeiture, anything in the settlement contained to the contrary notwithstanding.

51. The examination of such married woman when resident within the jurisdiction of the Court to which such application is made, shall be made either by the Court or by some solicitor duly appointed by the Court for that purpose, who shall certify under his hand that he has examined her apart from her husband and is satisfied that she is aware of the nature and effect of the intended application, and that she freely desires to make or consent to the same. And when the married woman is resident out of the jurisdiction of the Court to which such application is made, her examination may be made by any person appointed for that purpose by the Court, whether he is or is not a solicitor of the Court, and such person shall certify under his hand to the effect hereinbefore provided in respect of the examination of a married woman resident within the jurisdiction. And the appointment of any such person not being a solicitor shall afford conclusive evidence that the married woman was at the time of such examination resident out of the jurisdiction of the Court.

52. Subject to such examination as aforesaid, married women may make or consent to any applications, whether they be of full age or infants.

40 & 41 Vict. c. 13.
53. Nothing in this Act shall be construed to create any obligation on any person to make or consent to any application to the Court or to exercise any power.

women, whether of full age or under age.
54. For the purposes of this Act, a person shall be deemed to be entitled to the possession or to the receipt of the rents and profits of estates, although his estate may be charged or incumbered either by himself or by the settlor, or otherwise howsoever, to any extent; but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and profits as aforesaid unless they shall concur therein.

No obligation to make or consent to application, etc.  
Tenants for life, etc., to be deemed entitled notwithstanding incumbrances.
55. Provided always, that nothing in this Act shall authorise any sale or lease beyond the term of twenty-one years of any settled estates in respect of which, under the Act of the thirty-fourth and thirty-fifth years of King Henry the Eighth, chapter twenty, "to embar feigned recovery of lands wherein the King's Majesty is in reversion," or under any other Act of Parliament, the tenants in tail are restrained from barring or defeating their estates tail, or where the reversion is vested in the Crown.

Exception as to entails created by Act of Parliament.
56. Nothing in this Act shall authorise the granting of a lease of any copyhold or customary hereditaments not warranted by the custom of the manor without the consent of the lord, nor otherwise prejudice or affect the rights of any lord of a manor.

Saving rights of lords of manors.
57. This Act shall, except as hereinafter provided, apply to all matters existing at the time of the passing of this Act, whether proceedings are actually pending or not, and any proceedings in any such matter may be continued or taken under this Act as if the matter originated under this Act, or may be continued or taken under the Acts hereby repealed, or partly under this Act and partly under the said repealed Acts as occasion may require: Provided always, that the provisions in this Act contained respecting demises to be made without application to the Court shall extend only to settlements made after the first day of November one thousand eight hundred and fifty-six.

To what settlements this Act to extend.
58. The Acts specified in the schedule to this Act are hereby repealed: Provided always, that this repeal shall not affect anything done or any proceeding taken under any enactment hereby repealed.

Repeal of Acts specified in schedule.
59. Nothing in this Act shall interfere with the exercise of any powers to authorise or grant leases conferred by any Act of Parliament not expressly repealed by this Act.

Saving.
60. This Act shall not extend to Scotland.

Extent of Act.
61. This Act shall commence on the first day of November one thousand eight hundred and seventy-seven.

Commencement of Act.

SCHEDULE.

Session and Chapter.	Title or Short Title.
19 & 20 Vict. c. 120 -	An Act to facilitate leases and sales of Settled Estates.
21 & 22 Vict. c. 77 -	An Act to amend and extend the Settled Estates Act of 1856.
27 & 28 Vict. c. 45 -	An Act to further amend the Settled Estates Act of 1856.
37 & 38 Vict. c. 33 -	The Leases and Sales of Settled Estates Amendment Act, 1874.
39 & 40 Vict. c. 30 -	The Settled Estates Act, 1876.



## 40 &amp; 41 VICT. C. 33.

*An Act to amend the Law as to Contingent Remainders.* [2nd August, 1877.]

40 & 41 VICT.  
C. 33.  
— — — Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Cases in which contingent remainders capable of taking effect.

1. Every contingent remainder created by any instrument executed after the passing of this Act, or by any will or codicil revived or republished by any will or codicil executed after that date, in tenements or hereditaments of any tenure, which would have been valid as a springing or shifting use or executory devise or other limitation had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other executory limitation.

## 40 &amp; 41 VICT. C. 34.

*An Act to amend the Acts seventeenth and eighteenth Victoria, chapter one hundred and thirteen, and thirtieth and thirty-first Victoria, chapter sixty-nine.* [2nd August, 1877.]

40 & 41 VICT.  
C. 34.  
— — — Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Application of Acts in Schedule.

1. The Acts mentioned in the schedule hereto shall, as to any testator or intestate dying after the thirty-first of December one thousand eight hundred and seventy-seven, be held to extend to a testator or intestate dying seised or possessed of or entitled to any land or other hereditaments of whatever tenure which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, or any other equitable charge, including any lien for unpaid purchase money; and the devisee or legatee or heir shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate unless (in the case of a testator) he shall within the meaning of the said Acts have signified a contrary intention; and such contrary intention shall not be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal estate or residuary real estate.

Act not to extend to Scotland.

2. This Act shall not extend to Scotland.

## SCHEDULE.

17 & 18 Vict. c. 113	-	An Act to amend the law relating to the administration of the estates of deceased persons.
30 & 31 Vict. c. 69	-	An Act to explain the operation of the Act 17 & 18 Vict. c. 113.

41 & 42 VICT. C. 31 (*The Bills of Sale Act, 1878*).

*An Act to consolidate and amend the Law for preventing Frauds upon Creditors by secret Bills of Sale of Personal Chattels.*

[22nd July, 1878.]

41 & 42 VICT.  
C. 31.  
— — — Whereas it is expedient to consolidate and amend the law relating to bills of sale of personal chattels:

Be it enacted by the Queen's most Excellent Majesty, by and with the

advice and consent of the Lords spiritual and temporal, and Commons, 41 & 42 VICT.  
in this present Parliament assembled, and by the authority of the same, C. 81.  
as follows :

1. This Act may be cited for all purposes as the Bills of Sale Act, 1878. Short title.  
2. This Act shall come into operation on the first day of January one thousand eight hundred and seventy-nine, which day is in this Act referred to as the commencement of this Act. Commence-ment.

3. This Act shall apply to every bill of sale executed on or after the first day of January one thousand eight hundred and seventy-nine (whether the same be absolute, or subject or not subject to any trust) whereby the holder or grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale. Application of Act.

4. In this Act the following words and expressions shall have the meanings in this section assigned to them respectively, unless there be something in the subject or context repugnant to such construction ; (that is to say,) Interpreta-tion of terms.

The expression "bill of sale" shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred, but shall not include the following documents ; that is to say, assignments for the benefit of the creditors of the person making or giving the same, marriage settlements, transfers or assignments of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented.

The expression "personal chattels" shall mean goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops, but shall not include chattel interests in real estate, nor fixtures (except trade machinery as hereinafter defined), when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, nor growing crops when assigned together with any interest in the land on which they grow, nor shares or interests in the stock, funds, or securities of any Government, or in the capital or property of incorporated or joint stock companies, nor choses in action, nor any stock or produce upon any farm or lands which by virtue of any covenant or agreement or of the custom of the country ought not to be removed from any farm where the same are at the time of making or giving of such bill of sale :

Personal chattels shall be deemed to be in the "apparent possession" of the person making or giving a bill of sale, so long as they remain or are in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person :

"Prescribed" means prescribed by rules made under the provisions of this Act.

41 & 42 VICT.  
c. 31.

Application  
of Act to  
trade ma-  
chinery.

5. From and after the commencement of this Act trade machinery shall, for the purposes of this Act, be deemed to be personal chattels, and any mode of disposition of trade machinery by the owner thereof which would be a bill of sale as to any other personal chattels shall be deemed to be a bill of sale within the meaning of this Act.

For the purposes of this Act—

“Trade machinery” means the machinery used in or attached to any factory or workshop;

First. Exclusive of the fixed motive-powers, such as the water-wheels and steam engines, and the steam-boilers, donkey engines, and other fixed appurtenances of the said motive-powers; and,

Second. Exclusive of the fixed power machinery, such as the shafts, wheels, drums, and their fixed appurtenances, which transmit the action of the motive-powers to the other machinery, fixed and loose; and,

Third. Exclusive of the pipes for steam, gas, and water in the factory or workshop.

The machinery or effects excluded by this section from the definition of trade machinery shall not be deemed to be personal chattels within the meaning of this Act.

“Factory or workshop” means any premises on which any manual labour is exercised by way of trade, or for purposes of gain, in or incidental to the following purposes or any of them; that is to say,

(a) In or incidental to the making any article or part of an article; or

(b) In or incidental to the altering, repairing, ornamenting, finishing, of any article; or

(c) In or incidental to the adapting for sale any article.

Certain  
instruments  
giving  
powers of  
distress to  
be subject  
to this Act.

6. Every attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future, or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale, within the meaning of this Act, of any personal chattels which may be seized or taken under such power of distress.

Provided, that nothing in this section shall extend to any mortgage of any estate or interest in any land, tenement, or hereditament which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent.

Fixtures or  
growing  
crops not to  
be deemed  
separately  
assigned  
when the  
land passes  
by the same  
instrument.

7. No fixtures or growing crops shall be deemed, under this Act, to be separately assigned or charged by reason only that they are assigned by separate words, or that power is given to sever them from the land or building to which they are affixed, or from the land on which they grow; without otherwise taking possession of or dealing with such land or building, or land, if by the same instrument any freehold or leasehold interest in the land or building to which such fixtures are affixed, or in the land on which such crops grow, is also conveyed or assigned to the same persons or person.

The same rule of construction shall be applied to all deeds or instruments, including fixtures or growing crops, executed before the commencement of this Act and then subsisting and in force, in all questions arising under any bankruptcy, liquidation, assignment for the benefit of creditors, or execution of any process of any Court, which shall take place or be issued after the commencement of this Act.

Avoidance of

8. Every bill of sale to which this Act applies shall be duly attested



and shall be registered under this Act, within seven days after the making or giving thereof, and shall set forth the consideration for which such bill of sale was given, otherwise such bill of sale, as against all trustees or assignees of the estate of the person whose chattels, or any of them, are comprised in such bill of sale under the law relating to bankruptcy or liquidation, or under any assignment for the benefit of the creditors of such person, and also as against all sheriffs' officers and other persons seizing any chattels comprised in such bill of sale, in the execution of any process of any Court authorising the seizure of the chattels of the person by whom or of whose chattels such bill has been made, and also as against every person on whose behalf such process shall have been issued, shall be deemed fraudulent and void so far as regards the property in or right to the possession of any chattels comprised in such bill of sale which, at or after the time of filing the petition for bankruptcy or liquidation, or of the execution of such assignment, or of executing such process (as the case may be), and after the expiration of such seven days are in the possession or apparent possession of the person making such bill of sale (or of any person against whom the process has issued under or in the execution of which such bill has been made or given, as the case may be).

41 & 42 Vict.  
c. 31.

unregistered  
bill of sale in  
certain cases.

9. Where a subsequent bill of sale is executed within or on the expiration of seven days after the execution of a prior unregistered bill of sale, and comprises all or any part of the personal chattels comprised in such prior bill of sale, then, if such subsequent bill of sale is given as a security for the same debt as is secured by the prior bill of sale, or for any part of such debt, it shall, to the extent to which it is a security for the same debt or part thereof, and so far as respects the personal chattels or part thereof comprised in the prior bill, be absolutely void, unless it is proved to the satisfaction of the Court having cognizance of the case that the subsequent bill of sale was bonâ fide given for the purpose of correcting some material error in the prior bill of sale, and not for the purpose of evading this Act.

Avoidance  
of certain  
duplicate  
bills of sale.

10. A bill of sale shall be attested and registered under this Act in the following manner:

Mode of  
registering  
bills of sale.

- (1) The execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor:
- (2) Such bill, with every schedule or inventory thereto annexed or therein referred to, and also a true copy of such bill and of every such schedule or inventory, and of every attestation of the execution of such bill of sale, together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same (or in case the same is made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process issued), and of every attesting witness to such bill of sale, shall be presented to and the said copy and affidavit shall be filed with the registrar within seven clear days after the making or giving of such bill of sale, in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed:
- (3) If the bill of sale is made or given subject to any defeasance or condition, or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith and as part thereof, otherwise the registration shall be void.

41 & 42 VICT.  
c. 31. In case two or more bills of sale are given, comprising in whole or in part any of the same chattels, they shall have priority in the order of the date of their registration respectively as regards such chattels.

A transfer or assignment of a registered bill of sale need not be registered.

Renewal of registration. 11. The registration of a bill of sale, whether executed before or after the commencement of this Act, must be renewed once at least every five years, and if a period of five years elapses from the registration or renewed registration of a bill of sale without a renewal or further renewal (as the case may be), the registration shall become void.

The renewal of a registration shall be effected by filing with the registrar an affidavit stating the date of the bill of sale and of the last registration thereof, and the names, residences, and occupations of the parties thereto as stated therein, and that the bill of sale is still a subsisting security.

Every such affidavit may be in the form set forth in the Schedule (A.) to this Act annexed.

A renewal of registration shall not become necessary by reason only of a transfer or assignment of a bill of sale.

Form of register. 12. The registrar shall keep a book (in this Act called "the register") for the purposes of this Act, and shall, upon the filing of any bill of sale or copy under this Act, enter therein in the form set forth in the second schedule (B.) to this Act annexed, or in any other prescribed form, the name, residence, and occupation of the person by whom the bill was made or given (or in case the same was made or given by any person under or in the execution of process, then the name, residence, and occupation of the person against whom such process was issued, and also the name of the person or persons to whom or in whose favour the bill was given), and the other particulars shown in the said schedule or to be prescribed under this Act, and shall number all such bills registered in each year consecutively, according to the respective dates of their registration.

Upon the registration of any affidavit of renewal the like entry shall be made, with the addition of the date and number of the last previous entry relating to the same bill, and the bill of sale or copy originally filed shall be thereupon marked with the number affixed to such affidavit of renewal.

The registrar shall also keep an index of the names of the grantors of registered bills of sale with reference to entries in the register of the bills of sale given by each such grantor.

Such index shall be arranged in divisions corresponding with the letters of the alphabet, so that all grantors whose surnames begin with the same letter (and no others) shall be comprised in one division, but the arrangement within each such division need not be strictly alphabetical.

The registrar. 13. The masters of the Supreme Court of Judicature attached to the Queen's Bench Division of the High Court of Justice, or such other officers as may for the time being be assigned for this purpose under the provisions of the Supreme Court of Judicature Acts, 1873 and 1875, shall be the registrars for the purposes of this Act, and any one of the said masters may perform all or any of the duties of the registrar.

36 & 37 Vict.  
c. 66.  
38 & 39 Vict.  
c. 77.

Rectification of register. 14. Any judge of the High Court of Justice on being satisfied that the omission to register a bill of sale or an affidavit of renewal thereof within the time prescribed by this Act, or the omission or mis-statement of the name, residence, or occupation, of any person, was accidental or due to inadvertence, may in his discretion order such omission or mis-statement to be rectified by the insertion in the register of the true name, residence, or occupation, or by extending the time for such registration on such terms and conditions (if any) as to security, notice by advertisement or otherwise, or as to any other matter, as he thinks fit to direct.

Entry of 15. Subject to and in accordance with any rules to be made under and

for the purposes of this Act, the registrar may order a memorandum of satisfaction to be written upon any registered copy of a bill of sale, upon the prescribed evidence being given that the debt (if any) for which such bill of sale was made or given has been satisfied or discharged. 41 & 42 Vict.  
c. 31.  
satisfaction.

16. Any person shall be entitled to have an office copy or extract of any registered bill of sale, and affidavit of execution filed therewith, or copy thereof, and of any affidavit filed therewith, if any, or registered affidavit of renewal, upon paying for the same at the like rate as for office copies of judgments of the High Court of Justice, and any copy of a registered bill of sale, and affidavit purporting to be an office copy thereof, shall in all Courts and before all arbitrators or other persons, be admitted as *prima facie* evidence thereof, and of the fact and date of registration as shown thereon. Any person shall be entitled at all reasonable times to search the register and every registered bill of sale, upon payment of one shilling for every copy of a bill of sale inspected; such payment shall be made by a judicature stamp. Copies may  
be taken, etc.

17. Every affidavit required by or for the purposes of this Act may be sworn before a master of any division of the High Court of Justice, or before any commissioner empowered to take affidavits in the Supreme Court of Judicature. Affidavits.

Whoever wilfully makes or uses any false affidavit for the purposes of this Act shall be deemed guilty of wilful and corrupt perjury.

18. There shall be paid and received in common law stamps the following fees, viz.: Fees.

On filing a bill of sale	-	-	2s.
On filing the affidavit of execution of a bill of sale	-	-	2s.
On the affidavit used for the purpose of re-registering a bill of sale (to include the fee for filing) -	-	-	5s.

19. Section twenty-six of the Supreme Court of Judicature Act, 1875, and any enactments for the time being in force amending or substituted for that section, shall apply to fees under this Act, and an order under that section may, if need be, be made in relation to such fees accordingly. Collection of  
fees under  
38 & 39 Vict.  
c. 77, s. 26.

20. Chattels comprised in a bill of sale which has been and continues to be duly registered under this Act shall not be deemed to be in the possession, order, or disposition of the grantor of the bill of sale within the meaning of the Bankruptcy Act, 1869. Order and  
disposition.  
32 & 33 Vict.  
c. 71.

21. Rules for the purposes of this Act may be made and altered from time to time by the like persons and in the like manner in which rules and regulations may be made under and for the purposes of the Supreme Court of Judicature Acts, 1873 and 1875. Rules.  
36 & 37 Vict.  
c. 66.  
38 & 39 Vict.  
c. 77.

22. When the time for registering a bill of sale expires on a Sunday or other day on which the registrar's office is closed, the registration shall be valid if made on the next following day on which the office is open. Time for  
registration.

23. From and after the commencement of this Act, the Bills of Sale Act, 1854, and the Bills of Sale Act, 1866, shall be repealed: Provided that (except as is herein expressly mentioned with respect to construction and with respect to renewal of registration) nothing in this Act shall affect any bill of sale executed before the commencement of this Act, and as regards bills of sale so executed the Acts hereby repealed shall continue in force. Repeal of  
Acts.  
17 & 18 Vict.  
c. 36.  
29 & 30 Vict.  
c. 96.

Any renewal after the commencement of this Act of the registration of a bill of sale executed before the commencement of this Act, and registered under the Acts hereby repealed, shall be made under this Act in the same manner as the renewal of a registration made under this Act.

24. This Act shall not extend to Scotland or to Ireland.

Extent of  
Act.

## SCHEDULES.

## SCHEDULE A.

41 & 42 VICT.  
C. 31.

C. 31.

Section 11. I [A.B.] of do swear  
that a bill of sale, bearing date the day of  
18 [insert the date of the bill], and made between [insert the names  
and descriptions of the parties in the original bill of sale], and which  
said bill of sale [or, and a copy of which said bill of sale, as the case may  
be] was registered on the day of 18  
[insert date of registration], is still a subsisting security.  
Sworn, etc.

## SCHEDULE B.

## Section 12.

[illegible]

44 & 45 VICT. c. 41 (*The Conveyancing and Law of Property Act, 1881*).

*An Act for simplifying and improving the practice of Conveyancing: and for vesting in Trustees, Mortgagees, and others various powers commonly conferred by provisions inserted in Settlements, Mortgages, Wills, and other Instruments; and for amending in various particulars the Law of Property; and for other purposes.*

[22nd August, 1881.]

**44 & 45 VICT.  
c. 41.**

**PRE-  
LIMINARY.**

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

## I.—PRELIMINARY.

**Short title ;  
commence-  
ment.**

1.—(1) This Act may be cited as the Conveyancing and Law of Property Act, 1881.

(2) This Act shall commence and take effect from and immediately

after the thirty-first day of December one thousand eight hundred and eighty-one. 44 & 45 VICT. c. 41.

(3) This Act does not extend to Scotland.

2. In this Act—

(i.) Property, unless a contrary intention appears, includes real and personal property, and any estate or interest in any property, real or personal, and any debt, and anything in action, and any other right or interest :

(ii.) Land, unless a contrary intention appears, includes land of any tenure, and tenements and hereditaments, corporeal or incorporeal, and houses and other buildings, also an undivided share in land :

(iii.) In relation to land, income includes rents and profits, and possession includes receipt of income :

(iv.) Manor includes lordship, and reputed manor or lordship :

(v.) Conveyance, unless a contrary intention appears, includes assignment, appointment, lease, settlement, and other assurance, and covenant to surrender, made by deed, on a sale, mortgage, demise, or settlement of any property, or on any other dealing with or for any property ; and convey, unless a contrary intention appears, has a meaning corresponding with that of conveyance :

(vi.) Mortgage includes any charge on any property for securing money or money's worth ; and mortgage money means money, or money's worth, secured by a mortgage ; and mortgagor includes any person from time to time deriving title under the original mortgagor, or entitled to redeem a mortgage according to his estate, interest, or right, in the mortgaged property ; and mortgagee includes any person from time to time deriving title under the original mortgagee ; and mortgagee in possession is, for the purposes of this Act, a mortgagee who, in right of the mortgage, has entered into and is in possession of the mortgage property :

(vii.) Incumbrance includes a mortgage in fee, or for a less estate, and a trust for securing money, and a lien, and a charge of a portion, annuity, or other capital or annual sum ; and incumbrancer has a meaning corresponding with that of incumbrance, and includes every person entitled to the benefit of an incumbrance, or to require payment or discharge thereof :

(viii.) Purchaser, unless a contrary intention appears, includes a lessee or mortgagee, and an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for any property ; and purchase, unless a contrary intention appears, has a meaning corresponding with that of purchaser ; but sale means only a sale properly so called :

(ix.) Rent includes yearly or other rent, toll, duty, royalty, or other reservation, by the acre, the ton, or otherwise ; and fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift :

(x.) Building purposes include the erecting and the improving of, and the adding to, and the repairing of buildings ; and a building lease is a lease for building purposes or purposes connected therewith :

(xi.) A mining lease is a lease for mining purposes, that is, the searching for, winning, working, getting, making merchantable, carrying away, or disposing of mines and minerals, or purposes connected therewith, and includes a grant or licence for mining purposes :

(xii.) Will includes codicil :

(xiii.) Instrument includes deed, will, inclosure award, and Act of Parliament :

(xiv.) Securities include stocks, funds, and shares :

(xv.) Bankruptcy includes liquidation by arrangement, and any other act or proceeding in law having, under any Act for the time being in force, effects or results similar to those of bankruptcy ; and bankrupt has a meaning corresponding with that of bankruptcy :

PRE-  
LIMINARY.

Extent.  
Interpreta-  
tion of  
property,  
land, etc.

44 & 45 VICT.  
C. 41.

PRE-  
LIMINARY.

(xvi.) Writing includes print; and words referring to any instrument, copy, extract, abstract, or other document include any such instrument, copy, extract, abstract, or other document being in writing or in print, or partly in writing and partly in print:

(xvii.) Person includes a corporation:

(xviii.) Her Majesty's High Court of Justice is referred to as the Court.

SALES AND  
OTHER  
TRANS-  
ACTIONS.

## II.—SALES AND OTHER TRANSACTIONS.

### *Contracts for Sale.*

*Contracts  
for Sale.*

Application  
of stated  
conditions  
of sale to all  
purchasers.

3.—(1) Under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion.

(2) Where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then, under a contract to sell and convey the freehold, the purchaser shall not have the right to call for the title to make the enfranchisement.

(3) A purchaser of any property shall not require the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time prescribed by law, or stipulated, for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any information, or make any requisition, objection, or inquiry, with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title, is recited, covenanted to be produced, or noticed; and he shall assume, unless the contrary appears, that the recitals, contained in the abstracted instruments, of any deed, will, or other document, forming part of that prior title, are correct, and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, enrolment, or otherwise.

(4) Where land sold is held by lease (not including under-lease), the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and, on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase.

(5) Where land sold is held by under-lease, the purchaser shall assume, unless the contrary appears, that the under-lease and every superior lease were duly granted; and, on production of the receipt for the last payment due for rent under the under-lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the under-lease have been duly performed and observed up to the date of actual completion of the purchase, and further that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date.

(6) On a sale of any property, the expenses of the production and inspection of all Acts of Parliament, inclosure awards, records, proceedings of Courts, court rolls, deeds, wills, probates, letters of administration, and other documents, not in the vendor's possession, and the expenses of all journeys, incidental to such production or inspection, and the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession, and all attested, stamped, office, or other copies or abstracts of, or extracts from, any Acts of Parliament or other documents aforesaid, not in the vendor's possession, if any such production, inspection, journey, search, procuring, making, or verifying is required by a purchaser, either



for verification of the abstract, or for any other purpose, shall be borne by the purchaser who requires the same; and where the vendor retains possession of any document, the expenses of making any copy thereof, attested or unattested, which a purchaser requires to be delivered to him, shall be borne by that purchaser.

(7) On a sale of any property in lots, a purchaser of two or more lots, held wholly or partly under the same title, shall not have a right to more than one abstract of the common title, except at his own expense.

(8) This section applies only to titles and purchasers on sales properly so called, notwithstanding any interpretation in this Act.

(9) This section applies only if and as far as a contrary intention is not expressed in the contract of sale, and shall have effect subject to the terms of the contract and to the provisions therein contained.

(10) This section applies only to sales made after the commencement of this Act.

(11) Nothing in this section shall be construed as binding a purchaser to complete his purchase in any case where, on a contract made independently of this section, and containing stipulations similar to the provisions of this section, or any of them, specific performance of the contract would not be enforced against him by the Court.

4.—(1) Where at the death of any person there is subsisting a contract enforceable against his heir or devisee, for the sale of the fee simple or other freehold interest, descendible to his heirs general, in any land, his personal representatives shall, by virtue of this Act, have power to convey the land for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract.

(2) A conveyance made under this section shall not affect the beneficial rights of any person claiming under any testamentary disposition or as heir or next of kin of a testator or intestate.

(3) This section applies only in cases of death after the commencement of this Act.

#### *Discharge of Incumbrances on Sale.*

5.—(1) Where land subject to any incumbrance, whether immediately payable or not, is sold by the Court, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court, in case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, of such amount as, when invested in Government securities, the Court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge, and in any other case of capital money charged on the land, of the amount sufficient to meet the incumbrance and any interest due thereon; but in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses, and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reason thinks fit to require a larger additional amount.

(2) Thereupon, the Court may, if it thinks fit, and either after or without any notice to the incumbrancer, as the Court thinks fit, declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court.

(3) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(4) This section applies to sales not completed at the commencement of this Act, and to sales thereafter made.

44 & 45 Vict.  
C. 41.

SALES AND  
OTHER  
TRANS-  
ACTIONS.

*Contracts  
for Sale.*

Completion  
of contract  
after death.

*Discharge  
of Incum-  
brances on  
Sale.*

Provision by  
Court for  
incum-  
brances, and  
sale freed  
therefrom.

44 & 45 VICT.  
c. 41.

SALES AND  
OTHER  
TRANS-  
ACTIONS.

*General  
Words.*

General  
words in  
conveyances  
of land,  
buildings,  
or manor.

*General Words.*

6.—(1) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

(2) A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof.

(3) A conveyance of a manor shall be deemed to include and shall by virtue of this Act operate to convey, with the manor, all pastures, feedings, wastes, warrens, commons, mines, minerals, quarries, furzes, trees, woods, underwoods, coppices, and the ground and soil thereof, fishings, fisheries, fowlings, courts leet, courts baron, and other courts, view of frankpledge and all that to view of frankpledge doth belong, mills, mulctures, customs, tolls, duties, reliefs, heriots, fines, sums of money, amerciaments, waifs, estrays, chief-rents, quit-rents, rentscharge, rents seck, rents of assize, fee farm rents, services, royalties, jurisdictions, franchises, liberties, privileges, easements, profits, advantages, rights, emoluments, and hereditaments whatsoever, to the manor appertaining or reputed to appertain, or at the time of conveyance demised, occupied, or enjoyed with the same, or reputed or known as part, parcel, or member thereof.

(4) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

(5) This section shall not be construed as giving to any person a better title to any property, right, or thing in this section mentioned than the title which the conveyance gives to him to the land or manor expressed to be conveyed, or as conveying to him any property, right, or thing in this section mentioned, further or otherwise than as the same could have been conveyed to him by the conveying parties.

(6) This section applies only to conveyances made after the commencement of this Act.

*Covenants  
for Title.*

Covenants  
for title to  
be implied.

*Covenants for Title.*

7.—(1) In a conveyance there shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases, by virtue of this Act, be implied, a covenant to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter or share of subject-matter expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say:

(A.) In a conveyance for valuable consideration, other than a mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

That, notwithstanding anything by the person who so conveys, or any

On convey-  
ance for  
value, by  
beneficial  
owner.  
Right to  
convey.



one through whom he derives title, otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed, subject as, if so expressed, and in the manner in which, it is expressed to be conveyed, and that, notwithstanding anything as aforesaid, that subject-matter shall remain to, and be quietly entered upon, received and held, occupied, enjoyed, and taken, by the person to whom the conveyance is expressed to be made, and any person deriving title under him, and the benefit thereof shall be received and taken accordingly, without any lawful interruption or disturbance by the person who so conveys or any person conveying by his direction, or right-fully claiming or to claim by, through, under, or in trust for the person who so conveys, or any person conveying by his direction, or by, through, or under any one not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made, through whom the person who so conveys derives title, other- wise than by purchase for value; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all such estates, incumbrances, claims, and demands other than those subject to which the conveyance is expressly made, as either before or after the date of the conveyance have been or shall be made, occasioned, or suffered by that person or by any person conveying by his direction, or by any person right- fully claiming by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value; and further, that the person who so conveys, and any person convey- ing by his direction, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, other than an estate or interest subject whereto the conveyance is expressly made, by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value, will, from time to time and at all times after the date of the conveyance, on the request and at the cost of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required:

44 & 45 VICT.  
C. 41.

SALES AND  
OTHER  
TRANS-  
ACTIONS.

*Covenants  
for Sale.*

Quiet  
enjoyment.

Freedom  
from incum-  
brance.

Further  
assurance.

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage):

(B.) In a conveyance of leasehold property for valuable consideration, other than a mortgage, the following further covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

On convey-  
ance of lease-  
holds for  
value, by  
beneficial  
owner.

That, notwithstanding anything by the person who so conveys, or any one through whom he derives title otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the lease or grant creating the term or estate for which the land is con-veyed is, at the time of conveyance, a good, valid, and effectual lease or grant of the property conveyed, and is in full force, unforfeited, unsurrendered, and in nowise become void or voidable, and that, notwithstanding anything as aforesaid, all the rents reserved by, and

Validity of  
lease.

44 & 45 VICT.  
C. 41.

SALES AND  
OTHER  
TRANSACTIONS.

*Covenants  
for Title.*

(On mortgage, by  
beneficial  
owner.

Right to  
convey.

Quiet enjoyment.

Freedom  
from incum-  
brance.

Further  
assurance.

On mortgage  
of lease-  
holds, by  
beneficial  
owner.

Validity of  
lease.

Payment of  
rent and  
performance  
of covenants.

all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance :

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage) :

(C.) In a conveyance by way of mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely) :

That the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed by him, subject as, if so expressed, and in the manner in which it is expressed to be conveyed ; and also that, if default is made in payment of the money intended to be secured by the conveyance, or any interest thereon, or any part of that money or interest, contrary to any provision in the conveyance, it shall be lawful for the person to whom the conveyance is expressed to be made, and the persons deriving title under him, to enter into and upon, or receive, and thenceforth quietly hold, occupy, and enjoy or take and have, the subject-matter expressed to be conveyed, or any part thereof, without any lawful interruption or disturbance by the person who so conveys, or any person conveying by his direction, or any other person not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made ; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all estates, incumbrances, claims, and demands whatever, other than those subject whereto the conveyance is expressly made ; and further, that the person who so conveys and every person conveying by his direction, and every person deriving title under any of them, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, or any part thereof, other than an estate or interest subject whereto the conveyance is expressly made, will from time to time and at all times, on the request of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, but, as long as any right of redemption exists under the conveyance, at the cost of the person so conveying, or of those deriving title under him, and afterwards at the cost of the person making the request, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of conveyance and every part thereof to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required :

(D.) In a conveyance by way of mortgage of leasehold property, the following further covenant by a person who conveys and is expressed to convey as beneficial owner (namely) :

That the lease or grant creating the term or estate for which the land is held is, at the time of conveyance, a good, valid, and effectual lease or grant of the land conveyed and is in full force, unforfeited, and unsurrendered and in nowise become void or voidable, and that all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance ; and also that the person so conveying, or the persons deriving title under him, will at all times as long as any money remains on the security of the conveyance

pay, observe, and perform, or cause to be paid, observed, and performed all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, and will keep the person to whom the conveyance is made, and those deriving title under him, indemnified against all actions, proceedings, costs, charges, damages, claims and demands, if any, to be incurred or sustained by him or them by reason of the non-payment of such rent or the non-observance or non-performance of such covenants, conditions, and agreements, or any of them :

44 & 45 VICT.  
C. 41.

SALES AND  
OTHER  
TRANS-  
ACTIONS.

*Covenants  
for Title.*

(E.) In a conveyance by way of settlement, the following covenant by a person who conveys and is expressed to convey as settlor (namely) :

On settle-  
ment.

That the person so conveying, and every person deriving title under him by deed or act or operation of law in his lifetime subsequent to that conveyance, or by testamentary disposition or devolution in law, on his death, will, from time to time, and at all times, after the date of that conveyance, at the request and cost of any person deriving title thereunder, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the persons to whom the conveyance is made and those deriving title under them, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by them or any of them shall be reasonably required :

For further  
assurance,  
limited.

(F.) In any conveyance, the following covenant by every person who conveys and is expressed to convey as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, which covenant shall be deemed to extend to every such person's own acts only (namely) :

(On convey-  
ance by  
trustee or  
mortgagee.

That the person so conveying has not executed or done, or knowingly suffered, or been party or privy to, any deed or thing, whereby or by means whereof the subject-matter of the conveyance, or any part thereof, is or may be impeached, charged, affected, or incumbered in title, estate, or otherwise, or whereby or by means whereof the person who so conveys is in anywise hindered from conveying the subject-matter of the conveyance, or any part thereof, in the manner in which it is expressed to be conveyed.

Against in-  
cumbances.

(2) Where in a conveyance it is expressed that by direction of a person expressed to direct as beneficial owner another person conveys, then, within this section, the person giving the direction, whether he conveys and is expressed to convey as beneficial owner or not, shall be deemed to convey and to be expressed to convey as beneficial owner the subject-matter so conveyed by his direction ; and a covenant on his part shall be implied accordingly.

(3) Where a wife conveys and is expressed to convey as beneficial owner, and the husband also conveys and is expressed to convey as beneficial owner, then, within this section, the wife shall be deemed to convey and to be expressed to convey by direction of the husband, as beneficial owner ; and, in addition to the covenant implied on the part of the wife, there shall also be implied, first, a covenant on the part of the husband as the person giving that direction, and secondly, a covenant on the part of the husband in the same terms as the covenant implied on the part of the wife.

(4) Where in a conveyance a person conveying is not expressed to convey as beneficial owner, or as settlor, or as trustee, or as mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, or by direction of a person as beneficial owner, no covenant on the part of the person conveying shall be, by virtue of this section, implied in the conveyance.

44 & 45 VICT  
C. 41.

SALES AND  
OTHER  
TRANSACTIONS.

*Covenants  
for Title.*

(5) In this section a conveyance includes a deed conferring the right to admittance to copyhold or customary land, but does not include a demise by way of lease at a rent, or any customary assurance, other than a deed, conferring the right to admittance to copyhold or customary land.

(6) The benefit of a covenant implied as aforesaid shall be annexed and incident to, and shall go with, the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is, for the whole or any part thereof, from time to time vested.

(7) A covenant implied as aforesaid may be varied or extended by deed, and, as so varied or extended, shall, as far as may be, operate in the like manner, and with all the like incidents, effects, and consequences, as if such variations or extensions were directed in this section to be implied.

(8) This section applies only to conveyances made after the commencement of this Act.

*Execution of  
Purchase  
Deed.*

*Execution of Purchase Deed.*

Rights of  
purchaser as  
to execution.

8.—(1) On a sale, the purchaser shall not be entitled to require that the conveyance to him be executed in his presence, or in that of his solicitor, as such; but shall be entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor.

(2) This section applies only to sales made after the commencement of this Act.

*Production  
and Safe  
Custody of  
Title Deeds.*

*Production and Safe Custody of Title Deeds.*

Acknowledgment of  
right to  
production,  
and under-  
taking for  
safe custody  
of documents.

9.—(1) Where a person retains possession of documents, and gives to another an acknowledgment in writing of the right of that other to production of those documents, and to delivery of copies thereof (in this section called an acknowledgment), that acknowledgment shall have effect as in this section provided.

(2) An acknowledgment shall bind the documents to which it relates in the possession or under the control of the person who retains them, and in the possession or under the control of every other person having possession or control thereof from time to time, but shall bind each individual possessor or persons as long only as he has possession or control thereof; and every person so having possession or control from time to time shall be bound specifically to perform the obligations imposed under this section by an acknowledgment, unless prevented from so doing by fire or other inevitable accident.

(3) The obligations imposed under this section by an acknowledgment are to be performed from time to time at the request in writing of the person to whom an acknowledgment is given, or of any person, not being a lessee at a rent, having or claiming any estate, interest, or right through or under that person, or otherwise becoming through or under that person interested in or affected by the terms of any document to which the acknowledgment relates.

(4) The obligations imposed under this section by acknowledgment are—

- (i.) An obligation to produce the documents or any of them at all reasonable times for the purpose of inspection, and of comparison with abstracts or copies thereof, by the person entitled to request production or by any one by him authorized in writing; and
- (ii.) An obligation to produce the documents or any of them at any trial, hearing, or examination in any Court, or in the execution of any commission, or elsewhere in the United Kingdom, on any occasion on which production may properly be required, for proving or supporting the title or claim of the person entitled to request production, or for any other purpose relative to that title or claim; and

(iii.) An obligation to deliver to the person entitled to request the same true copies or extracts, attested or unattested, of or from the documents or any of them. 44 & 45 VICT.  
C. 41.

(5) All costs and expenses of or incidental to the specific performance of any obligation imposed under this section by an acknowledgment shall be paid by the person requesting performance.

SALES AND  
OTHER  
TRANS-  
ACTIONS.

(6) An acknowledgment shall not confer any right to damages for loss or destruction of, or injury to, the documents to which it relates, from whatever cause arising.

Production  
and Safe  
Custody of  
Title Deeds.

(7) Any person claiming to be entitled to the benefit of an acknowledgment may apply to the Court for an order directing the production of the documents to which it relates, or any of them, or the delivery of copies of or extracts from those documents or any of them to him, or some person on his behalf; and the Court may, if it thinks fit, order production, or production and delivery, accordingly, and may give directions respecting the time, place, terms, and mode of production or delivery, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

(8) An acknowledgment shall by virtue of this Act satisfy any liability to give a covenant for production and delivery of copies of or extracts from documents.

(9) Where a person retains possession of documents and gives to another an undertaking in writing for safe custody thereof, that undertaking shall impose on the person giving it, and on every person having possession or control of the documents from time to time, but on each individual possessor or person as long only as he has possession or control thereof, an obligation to keep the documents safe, whole, uncanceled, and undefaced, unless prevented from so doing by fire or other inevitable accident.

(10) Any person claiming to be entitled to the benefit of such an undertaking may apply to the Court to assess damages for any loss, destruction of, or injury to the documents or any of them, and the Court may, if it thinks fit, direct an inquiry respecting the amount of damages, and order payment thereof by the person liable, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

(11) An undertaking for safe custody of documents shall by virtue of this Act satisfy any liability to give a covenant for safe custody of documents.

(12) The rights conferred by an acknowledgment or an undertaking under this section shall be in addition to all such other rights relative to the production, or inspection, or the obtaining of copies of documents as are not, by virtue of this Act, satisfied by the giving of the acknowledgment or undertaking, and shall have effect subject to the terms of the acknowledgment or undertaking, and to any provisions therein contained.

(13) This section applies only if and as far as a contrary intention is not expressed in the acknowledgment or undertaking.

(14) This section applies only to an acknowledgment or undertaking given, or a liability respecting documents incurred, after the commencement of this Act.

### III.—LEASES.

#### LEASES.

10.—(1) Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken

Rent and  
benefit of  
lessee's  
covenants  
to run with  
reversion.



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C. 41.

**LEASES.**

Obligation  
of lessor's  
covenants  
to run with  
reversion.

advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased.

(2) This section applies only to leases made after the commencement of this Act.

11.—(1) The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled.

(2) This section applies only to leases made after the commencement of this Act.

Apportion-  
ment of con-  
ditions on  
severance,  
etc.

12.—(1) Notwithstanding the severance by conveyance, surrender, or otherwise, of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition, contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in any land which has not been surrendered, or as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease.

(2) This section applies only to leases made after the commencement of this Act.

On sub-  
demise, title  
to leasehold  
reversion  
not to be  
required.

13.—(1) On a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion.

(2) This section applies only if and as far as a contrary intention is not expressed in the contract, and shall have effect subject to the terms of the contract and to the provisions therein contained.

(3) This section applies only to contracts made after the commencement of this Act.

*Forfeiture.*

Restrictions  
on and relief  
against  
forfeiture  
of leases.

*Forfeiture.*

14.—(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

(2) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and

in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court, in the circumstances of each case, thinks fit.

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C. 41.

LEASES.

Forfeiture.

(3) For the purposes of this section a lease includes an original or derivative under-lease, also a grant at a fee farm rent, or securing a rent by condition; and a lessee includes an original or derivative under-lessee, and the heirs, executors, administrators, and assigns of a lessee, also a grantee under such a grant as aforesaid, his heirs and assigns; and a lessor includes an original or derivative under-lessor, and the heirs, executors, administrators, and assigns of a lessor, also a grantor as aforesaid, and his heirs and assigns.

(4) This section applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act of Parliament.

(5) For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

(6) This section does not extend —

(i.) To a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest; or

(ii.) In case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines or other things, or to enter or inspect the mine or the workings thereof.

(7) The enactments described in Part I. of the Second Schedule to this Act are hereby repealed.

(8) This section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.

(9) This section applies to leases made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

#### IV.—MORTGAGES.

MORTGAGES.

15.—(1) Where a mortgagor is entitled to redeem, he shall, by virtue of this Act, have power to require the mortgagee, instead of re-conveying, and on the terms on which he would be bound to re-convey, to assign the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs; and the mortgagee shall, by virtue of this Act, be bound to assign and convey accordingly.

Obligation on mort-  
gagee to  
transfer  
instead of  
re-convey-  
ing.

(2) This section does not apply in the case of a mortgagee being or having been in possession.

(3) This section applies to mortgages made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

16.—(1) A mortgagor, as long as his right to redeem subsists, shall, by virtue of this Act, be entitled from time to time, at reasonable times, on his request, and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee.

Power for  
mortgagor  
to inspect  
title deeds.

(2) This section applies only to mortgages made after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

17.—(1) A mortgagor seeking to redeem any one mortgage, shall, by virtue of this Act, be entitled to do so, without paying any money due

Restriction  
on consoli-

44 & 45 VICT.  
c. 41.

MORTGAGES.

creation of  
mortgages.

under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.

(2) This section applies only if and as far as a contrary intention is not expressed in the mortgage deeds or one of them.

(3) This section applies only where the mortgages or one of them are or is made after the commencement of this Act.

*Leases.*

Leasing  
powers of  
mortgagor  
and of  
mortgagee in  
possession.

*Leases.*

18.—(1) A mortgagor of land while in possession shall, as against every incumbrancer, have, by virtue of this Act, power to make from time to time any such lease of the mortgaged land, or any part thereof, as is in this section described and authorized.

(2) A mortgagee of land while in possession shall, as against all prior incumbrancers, if any, and as against the mortgagor, have, by virtue of this Act, power to make from time to time any such lease as aforesaid.

(3) The leases which this section authorizes are—

(i.) An agricultural or occupation lease for any term not exceeding twenty-one years; and

(ii.) A building lease for any term not exceeding ninety-nine years.

(4) Every person making a lease under this section may execute and do all assurances and things necessary or proper in that behalf.

(5) Every such lease shall be made to take effect in possession not later than twelve months after its date.

(6) Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken.

(7) Every such lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

(8) A counterpart of every such lease shall be executed by the lessee and delivered to the lessor, of which execution and delivery the execution of the lease by the lessor shall, in favour of the lessee and all persons deriving title under him, be sufficient evidence.

(9) Every such building lease shall be made in consideration of the lessee, or some person by whose direction the lease is granted, having erected, or agreeing to erect within not more than five years from the date of the lease, buildings, new or additional, or having improved or repaired buildings, or agreeing to improve or repair buildings within that time, or having executed, or agreeing to execute, within that time, on the land leased, an improvement for or in connection with building purposes.

(10) In any such building lease a peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years, or any less part of the term.

(11) In case of a lease by the mortgagor, he shall, within one month after making the lease, deliver to the mortgagee, or, where there are more than one, to the mortgagee first in priority, a counterpart of the lease duly executed by the lessee; but the lessee shall not be concerned to see that this provision is complied with.

(12) A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease if granted would be binding.

(13) This section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, and shall have effect subject to the terms of the mortgage deed or of any such writing and to the provisions therein contained.

(14) Nothing in this Act shall prevent the mortgage deed from reserving to or conferring on the mortgagor or the mortgagee, or both, any further or other powers of leasing or having reference to leasing; and



any further or other powers so reserved or conferred shall be exerciseable, as far as may be, as if they were conferred by this Act, and with all the like incidents, effects, and consequences, unless a contrary intention is expressed in the mortgage deed.

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C. 41.

MORTGAGES.

*Leases.*

(15) Nothing in this Act shall be construed to enable a mortgagor or mortgagee to make a lease for any longer term or on any other conditions than such as could have been granted or imposed by the mortgagor, with the concurrence of all the incumbrancers, if this Act had not been passed.

(16) This section applies only in case of a mortgage made after the commencement of this Act; but the provisions thereof, or any of them, may, by agreement in writing made after the commencement of this Act, between mortgagor and mortgagee, be applied to a mortgage made before the commencement of this Act, so, nevertheless, that any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement.

(17) The provisions of this section referring to a lease shall be construed to extend and apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting.

*Sale; Insurance; Receiver; Timber.*

*Sale; Insurance; Receiver; Timber.*

19.—(1) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):

Powers incident to estate or interest of mortgagee

- (i.) A power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges, or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby; and
- (ii.) A power, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money; and
- (iii.) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof; and
- (iv.) A power, while the mortgagee is in possession, to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament, or to contract for any such cutting and sale, to be completed within any time not exceeding twelve months from the making of the contract.

(2) The provisions of this Act relating to the foregoing powers, comprised either in this section, or in any subsequent section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the like manner and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in this Act.

(3) This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained.

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C. 41.

MORTGAGES.

Sale; Insur-  
ance; Re-  
ceiver;  
Timber.

Regulation  
of exercise  
of power  
of sale.

Conveyance,  
receipt, etc.  
on sale.

(4) This section applies only where the mortgage deed is executed after the commencement of this Act.

20. A mortgagee shall not exercise the power of sale conferred by this Act unless and until—

- (i.) Notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or
- (ii.) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or
- (iii.) There has been a breach of some provision contained in the mortgage deed or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon.

21.—(1) A mortgagee exercising the power of sale conferred by this Act shall have power, by deed, to convey the property sold, for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage; except that, in the case of copyhold or customary land, the legal right to admittance shall not pass by a deed under this section, unless the deed is sufficient otherwise by law, or is sufficient by custom, in that behalf.

(2) Where a conveyance is made in professed exercise of the power of sale conferred by this Act, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damaged by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

(3) The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into Court under this Act of a sum to meet any prior incumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses, properly incurred by him, as incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof.

(4) The power of sale conferred by this Act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money.

(5) The power of sale conferred by this Act shall not affect the right of foreclosure.

(6) The mortgagee, his executors, administrators, or assigns, shall not be answerable for any involuntary loss happening in or about the exercise or execution of the power of sale conferred by this Act or of any trust connected therewith.

(7) At any time after the power of sale conferred by this Act has become exerciseable, the person entitled to exercise the same may demand and recover from any person, other than a person having in the mortgaged property an estate, interest, or right in priority to the mortgage, all the deeds and documents relating to the property, or to the title thereto, which a purchaser under the power of sale would be entitled to demand and recover from him.

Mortgagee's  
receipts, dis-  
charges, etc.

22.—(1) The receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the power of sale conferred by

this Act, or for any money or securities comprised in his mortgage, or arising thereunder; and a person paying or transferring the same to the mortgagee shall not be concerned to inquire whether any money remains due under the mortgage.

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c. 41.

MORTGAGES.

(2) Money received by a mortgagee under his mortgage or from the proceeds of securities comprised in his mortgage shall be applied in like manner as in this Act directed respecting money received by him arising from a sale under the power of sale conferred by this Act; but with this variation, that the costs, charges, and expenses payable shall include the costs, charges, and expenses properly incurred of recovering and receiving the money or securities, and of conversion of securities into money, instead of those incident to sale.

Sale; Insurance; Receiver; Timber.

23.—(1) The amount of an insurance effected by a mortgagee against loss or damage by fire under the power in that behalf conferred by this Act shall not exceed the amount specified in the mortgage deed, or, if no amount is therein specified, then shall not exceed two third parts of the amount that would be required, in case of total destruction, to restore the property insured.

Amount and application of insurance money.

(2) An insurance shall not, under the power conferred by this Act, be effected by a mortgagee in any of the following cases (namely):

- (i.) Where there is a declaration in the mortgage deed that no insurance is required;
- (ii.) Where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed;
- (iii.) Where the mortgage deed contains no stipulation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor, to the amount in which the mortgagee is by this Act authorized to insure.

(3) All money received on an insurance effected under the mortgage deed or under this Act shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

(4) Without prejudice to any obligation to the contrary imposed by law, or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards discharge of the money due under his mortgage.

24.—(1) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act shall not appoint a receiver until he has become entitled to exercise the power of sale conferred by this Act, but may then, by writing under his hand, appoint such person as he thinks fit to be receiver.

Appointment, powers, remuneration, and duties of receiver.

(2) The receiver shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides.

(3) The receiver shall have power to demand and recover all the income of the property of which he is appointed receiver, by action, distress, or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts, accordingly, for the same.

(4) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorize the receiver to act.

(5) The receiver may be removed, and a new receiver may be appointed, from time to time by the mortgagee by writing under his hand.

(6) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges, and expenses incurred by him as receiver, a commission at such rate, not exceeding five per centum on the gross amount of all money received, as is specified in his appointment, and if no rate is so specified, then at the rate of five per centum on that gross amount or at such higher rate as the Court thinks fit to allow, on application made by him for that purpose.

44 & 45 Vict.  
c. 41.

MORTGAGES.

*Sale; Insurance; Receiver; Timber.*

(7) The receiver shall, if so directed in writing by the mortgagee, insure and keep insured against loss or damage by fire, out of the money received by him, any building, effects, or property comprised in the mortgage, whether affixed to the freehold or not, being of an insurable nature.

(8) The receiver shall apply all money received by him as follows (namely):

- (i.) In discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property; and
- (ii.) In keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver; and
- (iii.) In payment of his commission, and of the premiums on fire, life, or other insurances, if any, properly payable under the mortgage deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee; and
- (iv.) In payment of the interest accruing due in respect of any principal money due under the mortgage;

and shall pay the residue of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property.

*Action respecting Mortgage.*

*Action respecting Mortgage.*

*Sale of mortgaged property in action for foreclosure, etc.*

25.—(1) Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption, in the alternative.

(2) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the Court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgaged property, on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum fixed by the Court, to meet the expenses of sale and to secure performance of the terms.

(3) But, in an action brought by a person interested in the right of redemption and seeking a sale, the Court may, on the application of any defendant, direct the plaintiff to give such security for costs as the Court thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them.

(4) In any case within this section the Court may, if it thinks fit, direct a sale without previously determining the priorities of incumbrancers.

(5) This section applies to actions brought either before or after the commencement of this Act.

15 & 16 Vict.  
c. 80, s. 48.

(6) The enactment described in Part II. of the Second Schedule to this Act is hereby repealed.

STATUTORY  
MORTGAGE.

(7) This section does not extend to Ireland.

#### V.—STATUTORY MORTGAGE.

*Form of statutory mortgage in schedule.*

26.—(1) A mortgage of freehold or leasehold land may be made by a deed expressed to be made by way of statutory mortgage, being in the form given in Part I. of the Third Schedule to this Act, with such variation and additions, if any, as circumstances may require, and the provisions of this section shall apply thereto.

(2) There shall be deemed to be included, and there shall by virtue of this Act be implied, in the mortgage deed—

First, a covenant with the mortgagee by the person expressed therein to convey as mortgagor to the effect following (namely):

That the mortgagor will, on the stated day, pay to the mortgagee the stated mortgage money, with interest thereon in the meantime, at the stated rate, and will thereafter, if and as long as the mortgage money or any part thereof remains unpaid, pay to the mortgagee interest thereon, or on the unpaid part thereof, at the stated rate, by equal half-yearly payments, the first thereof to be made at the end of six calendar months from the day stated for payment of the mortgage money:

Secondly, a proviso to the effect following (namely):

That if the mortgagor, on the stated day, pays to the mortgagee the stated mortgage money, with interest thereon in the meantime, at the stated rate, the mortgagee at any time thereafter, at the request and cost of the mortgagor, shall re-convey the mortgaged property to the mortgagor, or as he shall direct.

27.—(1) A transfer of a statutory mortgage may be made by a deed expressed to be made by way of statutory transfer of mortgage, being in such one of the three forms (A.) and (B.) and (C.) given in Part II. of the Third Schedule to this Act as may be appropriate to the case, with such variations and additions, if any, as circumstances may require, and the provisions of this section shall apply thereto.

Forms of  
statutory  
transfer of  
mortgage in  
schedule.

(2) In whichever of those three forms the deed of transfer is made, it shall have effect as follows (namely):

(i.) There shall become vested in the person to whom the benefit of the mortgage is expressed to be transferred, who, with his executors, administrators, and assigns, is hereafter in this section designated the transferee, the right to demand, sue for, recover, and give receipts for the mortgage money, or the unpaid part thereof, and the interest then due, if any, and thenceforth to become due thereon, and the benefit of all securities for the same, and the benefit of and the right to sue on all covenants with the mortgagee, and the right to exercise all powers of the mortgagee:

(ii.) All the estate and interest, subject to redemption, of the mortgagee in the mortgaged land shall vest in the transferee, subject to redemption.

(3) If the deed of transfer is made in the form (B.), there shall also be deemed to be included, and there shall by virtue of this Act be implied therein, a covenant with the transferee by the person expressed to join therein as covenantor to the effect following (namely):

That the covenantor will, on the next of the days by the mortgage deed fixed for payment of interest, pay to the transferee the stated mortgage money, or so much thereof as then remains unpaid, with interest thereon, or on the unpaid part thereof, in the meantime, at the rate stated in the mortgage deed; and will thereafter, as long as the mortgage money, or any part thereof, remains unpaid, pay to the transferee interest on that sum, or the unpaid part thereof, at the same rate, on the successive days by the mortgage deed fixed for payment of interest.

(4) If the deed of transfer is made in the form (C.), it shall, by virtue of this Act, operate not only as a statutory transfer of mortgage, but also as a statutory mortgage, and the provisions of this section shall have effect in relation thereto, accordingly; but it shall not be liable to any increased stamp duty by reason only of it being designated a mortgage.

28.—In a deed of statutory mortgage, or of statutory transfer of mortgage, where more persons than one are expressed to convey as mortgagors, or to join as covenantors, the implied covenant on their

Implied  
covenants,  
joint and  
several.

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C. 41.

STATUTORY  
MORTGAGE.



44 & 45 Vict.  
c. 41.

STATUTORY  
MORTGAGE.

Form of  
re-convey-  
ance of  
statutory  
mortgage in  
schedule.

TRUST AND  
MORTGAGE  
ESTATES ON  
DEATH.

Devolution  
of trust and  
mortgage  
estates on  
death.

37 & 38 Vict.  
c. 78.  
38 & 39 Vict.  
c. 87.

TRUSTEES  
AND  
EXECUTORS.

Appoint-  
ment of new  
trustees,  
vesting of  
trust pro-  
perty, etc.

part shall be deemed to be a joint and several covenant by them; and where there are more mortgagees or more transferees than one, the implied covenant with them shall be deemed to be a covenant with them jointly, unless the amount secured is expressed to be secured to them in shares or distinct sums, in which latter case the implied covenant with them shall be deemed to be a covenant with each severally in respect of the share or distinct sum secured to him.

29.—A re-conveyance of a statutory mortgage may be made by a deed expressed to be made by way of statutory re-conveyance of mortgage, being in the form given in Part III. of the Third Schedule to this Act, with such variations and additions, if any, as circumstances may require.

#### VI.—TRUST AND MORTGAGE ESTATES ON DEATH.

30.—(1) Where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were a chattel real vesting in them or him; and, for the purposes of this section, the personal representatives, for the time being, of the deceased, shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers.

(2) Section four of the Vendor and Purchaser Act, 1874, and section forty-eight of the Land Transfer Act, 1875, are hereby repealed.

(3) This section, including the repeals therein, applies only in cases of death after the commencement of this Act.

#### VII.—TRUSTEES AND EXECUTORS.

31.—(1) Where a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for this purpose by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing or being unfit, or being incapable, as aforesaid.

(2) On an appointment of a new trustee, the number of trustees may be increased.

(3) On an appointment of a new trustee, it shall not be obligatory to appoint more than one new trustee, where only one trustee was originally appointed, or to fill up the original number of trustees, where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust.

(4) On an appointment of a new trustee any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done.

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C. 41.

(5) Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

TRUSTEES  
AND  
EXECUTORS.

(6) The provisions of this section relative to a trustee who is dead, include the case of a person nominated trustee in a will but dying before the testator; and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

(7) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(8) This section applies to trusts created either before or after the commencement of this Act.

32.—(1) Where there are more than two trustees, if one of them by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.

Retirement  
of trustee.

(2) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.

(3) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(4) This section applies to trusts created either before or after the commencement of this Act.

33.—(1) Every trustee appointed by the Court of Chancery, or by the Chancery Division of the Court, or by any other Court of competent jurisdiction, shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

Powers of  
new trustee  
appointed by  
Court.

(2) This section applies to appointments made either before or after the commencement of this Act.

34.—(1) Where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right.

Vesting of  
trust pro-  
perty in new  
or con-  
tinuing  
trustees.

(2) Where a deed by which a retiring trustee is discharged under this Act contains such a declaration as is in this section mentioned by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates.

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C. 41.

TRUSTEES  
AND  
EXECUTORS.

Power for  
trustees for  
sale to sell  
by auction,  
etc.

Trustees' re-  
ceipts.

Power for  
executors  
and trustees  
to com-  
pound, etc.

Powers to  
two or more  
executors or  
trustees.

(3) This section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner prescribed by or under Act of Parliament.

(4) For purposes of registration of the deed in any registry, the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.

(5) This section applies only to deeds executed after the commencement of this Act.

35.—(1) Where a trust for sale or a power of sale of property is vested in trustees, they may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title, or other matter, as the trustees think fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss.

(2) This section applies only if and as far as a contrary intention is not expressed in the instrument creating the trust or power, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(3) This section applies only to a trust or power created by an instrument coming into operation after the commencement of this Act.

36.—(1) The receipt in writing of any trustees or trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to them or him under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof.

(2) This section applies to trusts created either before or after the commencement of this Act.

37.—(1) An executor may pay or allow any debt or claim on any evidence that he thinks sufficient.

(2) An executor, or two or more trustees acting together, or a sole acting trustee where, by the instrument, if any, creating the trust, a sole trustee is authorized to execute the trusts and powers thereof, may, if and as he or they think fit, accept any composition, or any security, real or personal, for any debt, or for any property, real or personal, claimed, and may allow any time for payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.

(3) As regards trustees, this section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(4) This section applies to executorships and trusts constituted or created either before or after the commencement of this Act.

38.—(1) Where a power or trust is given to or vested in two or more executors or trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being.

(2) This section applies only to executorships and trusts constituted



after or created by instruments coming into operation after the commencement of this Act. 44 & 45 VICT.  
[c. 41.]

VIII.—MARRIED WOMEN.

MARRIED  
WOMEN.

39.—(1) Notwithstanding that a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property. Power for Court to bind interest of married woman.

(2) This section applies only to judgments or orders made after the commencement of this Act.

40.—(1) A married woman, whether an infant or not, shall by virtue of this Act have power, as if she were unmarried and of full age, by deed, to appoint an attorney on her behalf for the purpose of executing any deed or doing any other act which she might herself execute or do; and the provisions of this Act relating to instruments creating powers of attorney shall apply thereto. Power of attorney of married woman.

(2) This section applies only to deeds executed after the commencement of this Act.

IX.—INFANTS.

INFANTS.

41. Where a person in his own right seised of or entitled to land for an estate in fee simple, or for any leasehold interest at a rent, is an infant, the land shall be deemed to be a settled estate within the Settled Estates Act, 1877. Sales and leases on behalf of infant owner. 40 & 41 Vict. c. 18.

42.—(1) If and as long as any person who would but for this section be beneficially entitled to the possession of any land is an infant, and being a woman is also unmarried, the trustees appointed for this purpose by the settlement, if any, or if there are none so appointed, then the persons, if any, who are for the time being under the settlement trustees with power of sale of the settled land, or of part thereof, or with power of consent to or approval of the exercise of such a power of sale, or if there are none, then any persons appointed as trustees for this purpose by the Court, on the application of a guardian or next friend of the infant, may enter into and continue in possession of the land; and in every such case the subsequent provisions of this section shall apply. Management of land and receipt and application of income during minority.

(2) The trustees shall manage or superintend the management of the land, with full power to fell timber or cut underwood from time to time in the usual course for sale, or for repairs or otherwise, and to erect, pull down, rebuild, and repair houses, and other buildings and erections, and to continue the working of mines, minerals, and quarries which have usually been worked, and to drain or otherwise improve the land or any part thereof, and to insure against loss by fire, and to make allowances to and arrangements with tenants and others, and to determine tenancies, and to accept surrenders of leases and tenancies, and generally to deal with the land in a proper and due course of management; but so that, where the infant is impeachable for waste, the trustees shall not commit waste, and shall cut timber on the same terms only, and subject to the same restrictions, on and subject to which the infant could, if of full age, cut the same.

(3) The trustees may from time to time, out of the income of the land, including the produce of the sale of timber and underwood, pay the expenses incurred in the management, or in the exercise of any power conferred by this section, or otherwise in relation to the land, and all outgoings not payable by any tenant or other person, and shall keep down any annual sum, and the interest of any principal sum, charged on the land.

(4) The trustees may apply at discretion any income which, in the exercise of such discretion, they deem proper, according to the infant's age, for his or her maintenance, education, or benefit, or pay thereout

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C. 41.

INFANTS.

any money to the infant's parent or guardian, to be applied for the same purposes.

(5) The trustees shall lay out the residue of the income of the land in investment on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, with power to vary investments; and shall accumulate the income of the investments so made in the way of compound interest, by from time to time similarly investing such income and the resulting income of investments; and shall stand possessed of the accumulated fund arising from income of the land and from investments of income on the trusts following (namely) :

- (i.) If the infant attains the age of twenty-one years, then in trust for the infant ;
- (ii.) If the infant is a woman and marries while an infant, then in trust for her separate use, independently of her husband, and so that her receipt after she marries, and though still an infant, shall be a good discharge ; but
- (iii.) If the infant dies while an infant, and being a woman without having been married, then, where the infant was, under a settlement, tenant for life, or by purchase tenant in tail or tail male, or tail female, on the trusts, if any, declared of the accumulated fund by that settlement ; but where no such trusts are declared, or the infant has taken the land from which the accumulated fund is derived by descent, and not by purchase, or the infant is tenant for an estate in fee simple, absolute or determinable, then in trust for the infant's personal representatives, as part of the infant's personal estate ;

but the accumulations, or any part thereof, may at any time be applied as if the same were income arising in the then current year.

(6) Where the infant's estate or interest is in an undivided share of land, the powers of this section relative to the land may be exercised jointly with persons entitled to possession of, or having power to act in relation to, the other undivided share or shares.

(7) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(8) This section applies only where that instrument comes into operation after the commencement of this Act.

Application  
by trustees  
of income of  
property of  
infant for  
main-  
tenance, etc.

43.—(1) Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not.

(2) The trustees shall accumulate all the residue of that income in the way of compound interest, by investing the same and the resulting income thereof from time to time on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise ; but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year.

(3) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(4) This section applies whether that instrument comes into operation before or after the commencement of this Act. 44 & 45 VICT. C. 41.

#### X.—RENT-CHARGES AND OTHER ANNUAL SUMS.

44.—(1) Where a person is entitled to receive out of any land, or out of the income of any land, any annual sum, payable half-yearly or otherwise, whether charged on the land or on the income of the land, and whether by way of rentcharge or otherwise, not being rent incident to a reversion, then, subject and without prejudice to all estates, interests, and rights having priority to the annual sum, the person entitled to receive the same shall have such remedies for recovering and compelling payment of the same as are described in this section, as far as those remedies might have been conferred by the instrument under which the annual sum arises, but not further.

RENT-  
CHARGES  
AND OTHER  
ANNUAL  
SUMS.

Remedies  
for recovery  
of annual  
sums  
charged  
on land.

(2) If at any time the annual sum or any part thereof is unpaid for twenty-one days next after the time appointed for any payment in respect thereof, the person entitled to receive the annual sum may enter into and distrain on the land charged or any part thereof, and dispose according to law of any distress found, to the intent that thereby or otherwise the annual sum and all arrears thereof, and all costs and expenses occasioned by non-payment thereof, may be fully paid.

(3) If at any time the annual sum or any part thereof is unpaid for forty days next after the time appointed for any payment in respect thereof, then, although no legal demand has been made for payment thereof, the person entitled to receive the annual sum may enter into possession of and hold the land charged or any part thereof, and take the income thereof, until thereby or otherwise the annual sum and all arrears thereof due at the time of his entry, or afterwards becoming due during his continuance in possession, and all costs and expenses occasioned by non-payment of the annual sum, are fully paid; and such possession when taken shall be without impeachment of waste.

(4) In the like case the person entitled to the annual charge, whether taking possession or not, may also by deed demise the land charged, or any part thereof, to a trustee for a term of years, with or without impeachment of waste, on trust, by mortgage, or sale, or demise, for all or any part of the term, of the land charged, or of any part thereof, or by receipt of the income thereof, or by all or any of those means, or by any other reasonable means, to raise and pay the annual sum and all arrears thereof due or to become due, and all costs and expenses occasioned by non-payment of the annual sum, or incurred in compelling or obtaining payment thereof, or otherwise relating thereto, including the costs of the preparation and execution of the deed of demise, and the costs of the execution of the trusts of that deed; and the surplus, if any, of the money raised, or of the income received, under the trusts of that deed shall be paid to the person for the time being entitled to the land therein comprised in reversion immediately expectant on the term thereby created.

(5) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the annual sum arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(6) This section applies only where that instrument comes into operation after the commencement of this Act.

45.—(1) Where there is a quitrent, chief-rent, rentcharge, or other annual sum issuing out of land (in this section referred to as the rent), the Copyhold Commissioners shall at any time, on the requisition of the owner of the land, or of any person interested therein, certify the amount of money in consideration whereof the rent may be redeemed. Redemption of quitrents and other perpetual charges.

(2) Where the person entitled to the rent is absolutely entitled

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C. 41.

RENT-  
CHARGES  
AND OTHER  
ANNUAL  
SUMS.

thereto in fee simple in possession, or is empowered to dispose thereof absolutely, or to give an absolute discharge for the capital value thereof, the owner of the land, or any person interested therein, may, after serving one month's notice on the person entitled to the rent, pay or tender to that person the amount certified by the Commissioners.

(3) On proof to the Commissioners that payment or tender has been so made, they shall certify that the rent is redeemed under this Act; and that certificate shall be final and conclusive, and the land shall be thereby absolutely freed and discharged from the rent.

(4) Every requisition under this section shall be in writing; and every certificate under this section shall be in writing, sealed with the seal of the Commissioners.

(5) This section does not apply to tithe rentcharge, or to a rent reserved on a sale or lease, or to a rent made payable under a grant or licence for building purposes, or to any sum or payment issuing out of land not being perpetual.

(6) This section applies to rents payable at, or created after, the commencement of this Act.

(7) This section does not extend to Ireland.

OWNERS OF  
ATTORNEY.

#### XI.—POWERS OF ATTORNEY.

Execution  
under power  
of attorney.

46.—(1) The donee of a power of attorney may, if he thinks fit, execute or do any assurance, instrument, or thing in and with his own name and signature and his own seal, where sealing is required, by the authority of the donor of the power; and every assurance, instrument, and thing so executed and done shall be as effectual in law, to all intents, as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof.

(2) This section applies to powers of attorney created by instruments executed either before or after the commencement of this Act.

Payment by  
attorney  
under power  
without  
notice of  
death, etc.,  
good.

47.—(1) Any person making or doing any payment or act, in good faith, in pursuance of a power of attorney, shall not be liable in respect of the payment or act by reason that before the payment or act the donor of the power had died or become lunatic, of unsound mind, or bankrupt, or had revoked the power, if the fact of death, lunacy, unsoundness of mind, bankruptcy, or revocation was not at the time of the payment or act known to the person making or doing the same.

(2) But this section shall not affect any right against the payee of any person interested in any money so paid; and that person shall have the like remedy against the payee as he would have had against the payer if the payment had not been made by him.

(3) This section applies only to payments and acts made and done after the commencement of this Act.

Deposit of  
original  
instruments  
creating  
powers of  
attorney.

48.—(1) An instrument creating a power of attorney, its execution being verified by affidavit, statutory declaration, or other sufficient evidence, may, with the affidavit or declaration, if any, be deposited in the Central Office of the Supreme Court of Judicature.

2) A separate file of instruments so deposited shall be kept, and any person may search that file, and inspect every instrument so deposited, and an office copy thereof shall be delivered out to him on request.

(3) A copy of an instrument so deposited may be presented at the office, and may be stamped or marked as an office copy, and when so stamped or marked shall become and be an office copy.

(4) An office copy of an instrument so deposited shall without further proof be sufficient evidence of the contents of the instrument and of the deposit thereof in the Central Office.

(5) General Rules may be made for purposes of this section, regulating the practice of the Central Office, and prescribing, with the

concurrence of the Commissioners of Her Majesty's Treasury, the fees 44 & 45 Vict. to be taken therein. C. 41.

(6) This section applies to instruments creating powers of attorney executed either before or after the commencement of this Act.

XII.—CONSTRUCTION AND EFFECT OF DEEDS AND OTHER INSTRUMENTS.

CONSTRUCTION AND EFFECT OF DEEDS AND OTHER INSTRUMENTS.

49.—(1) It is hereby declared that the use of the word grant is not necessary in order to convey tenements or hereditaments, corporeal or incorporeal.

Use of word grant unnecessary.

(2) This section applies to conveyances made before or after the commencement of this Act.

50.—(1) Freehold land, or a thing in action, may be conveyed by a person to himself jointly with another person, by the like means by which it might be conveyed by him to another person; and may, in like manner, be conveyed by a husband to his wife, and by a wife to her husband, alone or jointly with another person.

Conveyance by a person to himself, etc.

(2) This section applies only to conveyances made after the commencement of this Act.

51.—(1) In a deed it shall be sufficient, in the limitation of an estate in fee simple, to use the words in fee simple, without the word heirs; and in the limitation of an estate in tail, to use the words in tail without the words heirs of the body; and in the limitation of an estate in tail male or in tail female, to use the words in tail male, or in tail female, as the case requires, without the words heirs male of the body, or heirs female of the body.

Words of limitation in fee or in tail.

(2) This section applies only to deeds executed after the commencement of this Act.

52.—(1) A person to whom any power, whether coupled with an interest or not, is given may by deed release, or contract not to exercise, the power.

Powers simply collateral.

(2) This section applies to powers created by instruments coming into operation either before or after the commencement of this Act.

53.—(1) A deed expressed to be supplemental to a previous deed, or directed to be read as an annex thereto, shall, as far as may be, be read and have effect as if the deed so expressed or directed were made by way of indorsement on the previous deed, or contained a full recital thereof.

Construction of supplemental or annexed deed.

(2) This section applies to deeds executed either before or after the commencement of this Act.

54.—(1) A receipt for consideration money or securities in the body of a deed shall be a sufficient discharge for the same to the person paying or delivering the same, without any further receipt for the same being indorsed on the deed.

Receipt in deed sufficient.

(2) This section applies only to deeds executed after the commencement of this Act.

55.—(1) A receipt for consideration money or other consideration in the body of a deed or indorsed thereon shall, in favour of a subsequent purchaser, not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given, wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof.

Receipt in deed or indorsed, evidence for subsequent purchaser.

(2) This section applies only to deeds executed after the commencement of this Act.

56.—(1) Where a solicitor produces a deed, having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without

Receipt in deed or indorsed authority for payment to solicitor.



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C. 41.

CONSTRUCTION AND  
EFFECT OF  
DEEDS AND  
OTHER INSTRUMENTS.

Sufficiency  
of forms in  
Fourth Schedule.

Covenants  
to bind  
heirs, etc.

Covenants to  
extend to  
heirs, etc.

Effect of  
covenant  
with two  
or more  
jointly.

Effect of  
advance on  
joint account, etc.

the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt.

(2) This section applies only in cases where consideration is to be paid or given after the commencement of this Act.

57.—Deeds in the form of and using the expressions in the Forms given in the Fourth Schedule to this Act, or in the like form or using expressions to the like effect, shall, as regards form and expression in relation to the provisions of this Act, be sufficient.

58.—(1) A covenant relating to land of inheritance, or devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed.

(2) A covenant relating to land not of inheritance, or not devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his executors, administrators, and assigns, and shall have effect as if executors, administrators, and assigns were expressed.

(3) This section applies only to covenants made after the commencement of this Act.

59.—(1) A covenant, and a contract under seal, and a bond or obligation under seal, though not expressed to bind the heirs, shall operate in law to bind the heirs and real estate, as well as the executors and administrators and personal estate, of the person making the same, as if heirs were expressed.

(2) This section extends to a covenant implied by virtue of this Act.

(3) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the terms of the covenant, contract, bond, or obligation, and to the provisions therein contained.

(4) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this Act.

60.—(1) A covenant, and a contract under seal, and a bond or obligation under seal, made with two or more jointly, to pay money or to make a conveyance, or to do any other act, to them or for their benefit, shall be deemed to include, and shall, by virtue of this Act, imply an obligation to do the act to, or for the benefit of, the survivor or survivors of them, and to, or for the benefit of, any other person to whom the right to sue on the covenant, contract, bond, or obligation devolves.

(2) This section extends to a covenant implied by virtue of this Act.

(3) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the covenant, contract, bond, or obligation, and to the provisions therein contained.

(4) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this Act.

61.—(1) Where in a mortgage, or an obligation for payment of money, or a transfer of a mortgage or of such an obligation, the sum, or any part of the sum, advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as money, belonging to them on a joint account, or a mortgage, or such an obligation, or such a transfer is made to more persons than one, jointly, and not in shares, the mortgage money, or other money, or money's worth for the time being due to those persons on the mortgage or obligation, shall be deemed to be and remain money<sup>o</sup> or money's worth belonging to those persons on a joint account, as between them and the mortgagor or obligor; and the receipt in writing of the survivors or last survivor of them, or of the personal representatives of the last survivor, shall be a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account.

(2) This section applies only if and as far as a contrary intention is

not expressed in the mortgage, or obligation, or transfer, and shall have effect subject to the terms of the mortgage, or obligation, or transfer, and to the provisions therein contained. 44 & 45 VICT.  
C. 41.

(3) This section applies only to a mortgage, or obligation, or transfer made after the commencement of this Act.

62.—(1) A conveyance of freehold land to the use that any person may have, for an estate or interest not exceeding in duration the estate conveyed in the land, any easement, right, liberty, or privilege in, or over, or with respect to that land, or any part thereof, shall operate to vest in possession in that person that easement, right, liberty, or privilege, for the estate or interest expressed to be limited to him; and he, and the persons deriving title under him, shall have, use, and enjoy the same accordingly. CONSTRUC-  
TION AND  
EFFECT OF  
DEEDS AND  
OTHER IN-  
STRUMENTS.  
  
Grants of  
easements,  
etc., by way  
of use.

(2) This section applies only to conveyances made after the commencement of this Act.

63.—(1) Every conveyance shall, by virtue of this Act, be effectual to pass all the estate, right, title, interest, claim, and demand which the conveying parties respectively have, in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same. Provision for  
all the  
estate, etc.

(2) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

(3) This section applies only to conveyances made after the commencement of this Act.

64. In the construction of a covenant or proviso, or other provision, implied in a deed by virtue of this Act, words importing the singular or plural number, or the masculine gender, shall be read as also importing the plural or singular number, or as extending to females, as the case may require. Construction  
of implied  
covenants.

### XIII.—LONG TERMS.

65.—(1) Where a residue unexpired of not less than two hundred years of a term, which, as originally created, was for not less than three hundred years, is subsisting in land, whether being the whole land originally comprised in the term, or part only thereof, without any trust or right of redemption affecting the term in favour of the freeholder, or other person entitled in reversion expectant on the term, and without any rent, or with merely a peppercorn rent or other rent having no money value, incident to the reversion, or having had a rent, not being merely a peppercorn rent or other rent having no money value, originally so incident, which subsequently has been released, or has become barred by lapse of time, or has in any other way ceased to be payable, then the term may be enlarged into a fee simple in the manner, and subject to the restrictions, in this section provided. LONG  
TERMS.  
  
Enlarge-  
ment of  
residue of  
long term  
into fee  
simple.

(2) Each of the following persons (namely):

(i.) Any person beneficially entitled in right of the term, whether subject to any incumbrance or not, to possession of any land comprised in the term; but, in case of a married woman, with the concurrence of her husband, unless she is entitled for her separate use, whether with restraint on anticipation or not, and then without his concurrence;

(ii.) Any person being in receipt of income as trustee, in right of the term, or having the term vested in him in trust for sale, whether subject to any incumbrance or not;

(iii.) Any person in whom, as personal representative of any deceased person, the term is vested, whether subject to any incumbrance or not;

shall, as far as regards the land to which he is entitled, or in which he is interested, in right of the term, in any such character as aforesaid, have power by deed to declare to the effect that, from and after the execution of the deed, the term shall be enlarged into a fee simple.

44 & 45 VICT.  
C. 41.

LONG  
TERMS.

(3) Thereupon, by virtue of the deed and of this Act, the term shall become and be enlarged accordingly, and the person in whom the term was previously vested shall acquire and have in the land a fee simple instead of the term.

(4) The estate in fee simple so acquired by enlargement shall be subject to all the same trusts, powers, executory limitations over, rights, and equities, and to all the same covenants and provisions relating to user and enjoyment, and to all the same obligations of every kind, as the term would have been subject to if it had not been so enlarged.

(5) But where any land so held for the residue of a term has been settled in trust by reference to other land, being freehold land, so as to go along with that other land as far as the law permits, and, at the time of enlargement, the ultimate beneficial interest in the term, whether subject to any subsisting particular estate or not, has not become absolutely and indefeasibly vested in any person, then the estate in fee simple acquired as aforesaid shall, without prejudice to any conveyance for value previously made by a person having a contingent or defeasible interest in the term, be liable to be, and shall be, conveyed and settled in like manner as the other land, being freehold land, aforesaid, and until so conveyed and settled shall devolve beneficially as if it had been so conveyed and settled.

(6) The estate in fee simple so acquired shall, whether the term was originally created without impeachment of waste or not, include the fee simple in all mines and minerals which at the time of enlargement have not been severed in right, or in fact, or have not been severed or reserved by an inclosure Act or award.

(7) This section applies to every such term as aforesaid subsisting at or after the commencement of this Act.

ADOPTION  
OF ACT.

#### XIV.—ADOPTION OF ACT.

Protection of  
solicitor and  
trustees  
adopting  
Act

66.—(1) It is hereby declared that the powers given by this Act to any person, and the covenants, provisions, stipulations, and words which under this Act are to be deemed included or implied in any instrument, or are by this Act made applicable to any contract for sale or other transaction, are and shall be deemed in law proper powers, covenants, provisions, stipulations, and words, to be given by or to be contained in any such instrument, or to be adopted in connection with, or applied to, any such contract or transaction; and a solicitor shall not be deemed guilty of neglect or breach of duty, or become in any way liable, by reason of his omitting, in good faith, in any such instrument, or in connection with any such contract or transaction, to negative the giving, inclusion, implication, or application of any of those powers, covenants, provisions, stipulations, or words, or to insert or apply any others in place thereof, in any case where the provisions of this Act would allow of his doing so.

(2) But nothing in this Act shall be taken to imply that the insertion in any such instrument, or the adoption in connection with, or the application to, any contract or transaction, of any further or other powers, covenants, provisions, stipulations, or words is improper.

(3) Where the solicitor is acting for trustees, executors, or other persons in a fiduciary position, those persons shall also be protected in like manner.

(4) Where such persons are acting without a solicitor, they shall also be protected in like manner.

MISCELLA-  
NEOUS.

#### XV.—MISCELLANEOUS.

Regulations  
respecting  
notice.

67.—(1) Any notice required or authorized by this Act to be served shall be in writing.

(2) Any notice required or authorized by this Act to be served on a lessee or mortgagor shall be sufficient, although only addressed to the



lessee or mortgagor by that designation, without his name, or generally to the persons interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained.

44 & 45 VICT.  
C. 41.

MISCELLA-  
NEOUS.

(3) Any notice required or authorized by this Act to be served shall be sufficiently served if it is left at the last-known place of abode or business in the United Kingdom of the lessee, lessor, mortgagee, mortgagor, or other person to be served, or, in case of a notice required or authorized to be served on a lessee or mortgagor, is affixed or left for him on the land or any house or building comprised in the lease or mortgage, or, in case of a mining lease, is left for the lessee at the office or counting-house of the mine.

(4) Any notice required or authorized by this Act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name, at the aforesaid place of abode or business, office, or counting-house, and if that letter is not returned through the post-office undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.

(5) This section does not apply to notices served in proceedings in the Court.

68. The Act described in Part II. of the First Schedule to this Act shall, by virtue of this Act, have the short title of the Statutory Declarations Act, 1835, and may be cited by that short title in any declaration made for any purpose under or by virtue of that Act, or in any other document, or in any Act of Parliament.

Short title of  
5 & 6 Will. 4.  
c. 62.

COURT; PRO-  
CEDURE;  
ORDERS.

#### XVI.—COURT; PROCEDURE; ORDERS.

69.—(1) All matters within the jurisdiction of the Court under this Act shall, subject to the Acts regulating the Court, be assigned to the Chancery Division of the Court.

Regulations  
respecting  
payments  
into Court  
and applica-  
tions.

(2) Payment of money into Court shall effectually exonerate therefrom the person making the payment.

(3) Every application to the Court shall, except where it is otherwise expressed, be by summons at Chambers.

(4) On an application by a purchaser notice shall be served in the first instance on the vendor.

(5) On an application by a vendor notice shall be served in the first instance on the purchaser.

(6) On any application notice shall be served on such persons, if any, as the Court thinks fit.

(7) The Court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application.

(8) General Rules for purposes of this Act shall be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, and may be made accordingly.

39 & 40 Vict.  
c. 59, s. 17.

(9) The powers of the Court may, as regards land in the County Palatine of Lancaster, be exercised also by the Court of Chancery of the County Palatine; and Rules for regulating proceedings in that Court shall be from time to time made by the Chancellor of the Duchy of Lancaster, with the advice and consent of a Judge of the High Court acting in the Chancery Division, and of the Vice-Chancellor of the County Palatine.

(10) General Rules, and Rules of the Court of Chancery of the County Palatine, under this Act may be made at any time after the passing of this Act, to take effect on or after the commencement of this Act.

70.—(1) An order of the Court under any statutory or other jurisdiction shall not as against a purchaser, be invalidated on the ground

Orders of  
Court con-  
clusive.

44 & 45 VICT. c. 41. of want of jurisdiction, or of want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not.

COURT; PRO- (2) This section shall have effect with respect to any lease, sale, or  
CEDURE; other act under the authority of the Court, and purporting to be in pur-  
ORDERS. suance of the Settled Estates Act, 1877, notwithstanding the exception  
in section forty of that Act, or to be in pursuance of any former Act  
repealed by that Act, notwithstanding any exception in such former Act.

40 & 41 VICT. c. 18, s. 40. (3) This section applies to all orders made before or after the com-  
mencement of this Act, except any order which has before the com-  
mencement of this Act been set aside or determined to be invalid on any  
ground, and except any order as regards which an action or proceeding  
is at the commencement of this Act pending for having it set aside or  
determined to be invalid.

#### REPEALS.

#### XVII.—REPEALS.

Repeal of  
enactments  
in Part III.  
of Second  
Schedule;  
restriction  
on all re-  
peals.

71.—(1) The enactments described in Part III. of the Second Schedule to this Act are hereby repealed.

(2) The repeal by this Act of any enactment shall not affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, before the commencement of this Act, or any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this Act; but this provision shall not be construed as qualifying the provision of this Act relating to section forty of the Settled Estates Act, 1877, or any former Act repealed by that Act.

#### IRELAND.

#### XVIII.—IRELAND.

Modifica-  
tions re-  
specting  
Ireland.

72.—(1) In the application of this Act to Ireland the foregoing provisions shall be modified as in this section provided.

(2) The Court shall be Her Majesty's High Court of Justice in Ireland.

(3) All matters within the jurisdiction of that Court shall, subject to the Acts regulating that Court, be assigned to the Chancery Division of that Court; but General Rules under this Act may direct that any of those matters be assigned to the Land Judges of that Division.

(4) The proper office of the Supreme Court of Judicature in Ireland shall be substituted for the central office of the Supreme Court of Judicature.

40 & 41 VICT. c. 57, s. 69.

(5) General Rules for purposes of this Act for Ireland shall be deemed Rules of Court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, at any time after the passing of this Act, to take effect on or after the commencement of this Act.

Death of  
bare trustee  
intestate,  
etc. 37 & 38  
VICT. c. 78.

73.—(1) Section five of the Vendor and Purchaser Act, 1874, is hereby repealed from and after the commencement of this Act, as regards cases of death thereafter happening; and section seven of the Vendor and Purchaser Act, 1874, is hereby repealed as from the date at which it came into operation.

(2) This section extends to Ireland only.

## SCHEDULES.

### THE FIRST SCHEDULE.

#### ACTS AFFECTED.

#### PART I.

1 & 2 VICT. c. 110.—An Act for abolishing arrest on mesne process in civil actions, except in certain cases; for extending the remedies of creditors against the property of debtors; and for amending the laws for the relief of insolvent debtors in England.

- 2 & 3 Vict. c. 11.—An Act for the better protection of purchasers against judgments, Crown debts, lis pendens, and fiats in bankruptcy. 44 & 45 Vict.  
c. 41.
- 18 & 19 Vict. c. 15.—An Act for the better protection of purchasers against judgments, Crown debts, cases of lis pendens, and life annuities or rentcharges.
- 22 & 23 Vict. c. 35.—An Act to further amend the law of property and to relieve trustees.
- 23 & 24 Vict. c. 38.—An Act to further amend the law of property.
- 23 & 24 Vict. c. 115.—An Act to simplify and amend the practice as to the entry of satisfaction on Crown debts and on judgments.
- 27 & 28 Vict. c. 112.—An Act to amend the law relating to future judgments, statutes, and recognizances.
- 28 & 29 Vict. c. 104.—The Crown Suits, etc., Act, 1865.
- 31 & 32 Vict. c. 54.—The Judgments Extension Act, 1868.

PART II.

5 & 6 Will. 4, c. 62.—An Act to repeal an Act of the present session of Parliament, intituled “An Act for the more effectual abolition of oaths and affirmations taken and made in various Departments of the State, and to substitute declarations in lieu thereof; and for the more entire suppression of voluntary and extra-judicial oaths and affidavits;” and to make other provisions for the abolition of unnecessary oaths.

THE SECOND SCHEDULE.

REPEALS.

A description or citation of a portion of an Act is inclusive of the words, section, or other part, first or last mentioned, or otherwise referred to as forming the beginning, or as forming the end, of the portion comprised in the description or citation.

PART I.

22 & 23 Vict. c. 35. in part.	An Act to further amend the law of property and to relieve trustees Sections four to nine.	} in part; namely,—
23 & 24 Vict. c. 126. in part.	The Common Law Procedure Act, 1860 Section two.	

PART II.

15 & 16 Vict. c. 86. in part.	An Act to amend the practice and course of proceeding in the High Court of Chancery Section forty-eight.	} in part; namely,—

PART III.

8 & 9 Vict. c. 119.	An Act to facilitate the conveyance of real property.	} in part; namely,—
23 & 24 Vict. c. 145. in part.	An Act to give to trustees, mortgagees, and others certain powers now commonly inserted in settlements, mortgages, and wills Parts II. & III. (sections eleven to thirty).	

## THE THIRD SCHEDULE.

## STATUTORY MORTGAGE.

## PART I.

*Deed of Statutory Mortgage.*

THIS INDENTURE made by way of statutory mortgage the day of 1882 between A. of [§c.] of the one part and M. of [§c.] of the other part WITNESSETH that in consideration of the sum of £ now paid to A. by M. of which sum A. hereby acknowledges the receipt A. as mortgagor and as beneficial owner hereby conveys to M. All that [§c.] To hold to and to the use of M. in fee simple for securing payment on the day of 1883 of the principal sum of £ as the mortgage money with interest thereon at the rate of [four] per centum per annum.

In witness, &c.

\*.\* Variations in this and subsequent forms to be made, if required, for leasehold land, or other matter.

## PART II.

## (A.)

*Deed of Statutory Transfer, Mortgagor not joining.*

THIS INDENTURE made by way of statutory transfer of mortgage the day of 1883 between M. of [§c.] of the one part and T. of [§c.] of the other part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [§c.] WITNESSETH that in consideration of the sum of £ now paid to M. by T. being the aggregate amount of £ mortgage money and £ interest due in respect of the said mortgage of which sum M. hereby acknowledges the receipt M. as mortgagee hereby conveys and transfers to T. the benefit of the said mortgage.

In witness, &c.

## (B.)

*Deed of Statutory Transfer, a Covenantor joining.*

THIS INDENTURE made by way of statutory transfer of mortgage the day of 1883 between A. of [§c.] of the first part B. of [§c.] of the second part and C. of [§c.] of the third part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [§c.] WITNESSETH that in consideration of the sum of £ now paid to A. by C. being the mortgage money due in respect of the said mortgage no interest being now due and payable thereon of which sum A. hereby acknowledges the receipt A. as mortgagee with the concurrence of B. who joins herein as covenantor hereby conveys and transfers to C. the benefit of the said mortgage.

In witness, &c.

## (C.)

*Statutory Transfer and Statutory Mortgage combined.*

THIS INDENTURE made by way of statutory transfer of mortgage and statutory mortgage the day of 1883 between A. of [§c.] of the first part B. of [§c.] of the second part and C. of [§c.] of the third part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [§c.] WHEREAS the principal sum of £ only remains due in respect of the said mortgage as the mortgage money and no interest is now due

and payable thereon AND WHEREAS *B.* is seised in fee simple of the land comprised in the said mortgage subject to that mortgage Now THIS INDENTURE WITNESSETH that in consideration of the sum of £ now paid to *A.* by *C.* of which sum *A.* hereby acknowledges the receipt and *B.* hereby acknowledges the payment and receipt as aforesaid\* *A.* as mortgagee hereby conveys and transfers to *C.* the benefit of the said mortgage AND THIS INDENTURE ALSO WITNESSETH that for the same consideration *A.* as mortgagee and according to his estate and by direction of *B.* hereby conveys and *B.* as beneficial owner hereby conveys and confirms to *C.* All that [*&c.*] To hold to and to the use of *C.* in fee simple for securing payment on the day of 1882 of † the sum of £ as the mortgage money with interest thereon at the rate of [*four*] per centum per annum.

44 & 45 Vict.  
c. 41.

In witness, &c.

[*Or, in case of further advance after aforesaid at\* insert and also in consideration of the further sum of £ now paid by C. to B. of which sum B. hereby acknowledges the receipt, and after of at † insert the sums of £ and £ making together*]

\* \* Variations to be made, as required, in case of the deed being made by indorsement, or in respect of any other thing.

### PART III.

#### *Deed of Statutory Re-conveyance of Mortgage.*

THIS INDENTURE made by way of statutory re-conveyance of mortgage the day of 1884 between *C.* of [*&c.*] of the one part and *B.* of [*&c.*] of the other part supplemental to an indenture made by way of statutory transfer of mortgage dated the day of 1883 and made between [*&c.*] WITNESSETH that in consideration of all principal money and interest due under that indenture having been paid of which principal and interest *C.* hereby acknowledges the receipt *C.* as mortgagee hereby conveys to *B.* all the lands and hereditaments now vested in *C.* under the said indenture To hold to and to the use of *B.* in fee simple discharged from all principal money and interest secured by and from all claims and demands under the said indenture.

In witness, &c.

\* \* Variations as noted above.

### THE FOURTH SCHEDULE.

#### SHORT FORMS OF DEEDS.

##### I.—*Mortgage.*

THIS INDENTURE OF MORTGAGE made the day of 1882 between *A.* of [*&c.*] of the one part and *B.* of [*&c.*] and *C.* of [*&c.*] of the other part WITNESSETH that in consideration of the sum of £ paid to *A.* by *B.* and *C.* out of money belonging to them on a joint account of which sum *A.* hereby acknowledges the receipt *A.* hereby covenants with *B.* and *C.* to pay to them on the day of 1882 the sum of £ with interest thereon in the meantime at the rate of [*four*] per centum per annum and also as long after that day as any principal money remains due under this mortgage to pay to *B.* and *C.* interest thereon at the same rate by equal half-yearly payments on the day of and the day of AND THIS INDENTURE ALSO WITNESSETH that for the same consideration *A.* as beneficial owner hereby conveys to *B.* and *C.* All that [*&c.*] To hold to and to the use of *B.* and *C.* in fee simple subject to the proviso for redemption following (namely) that if *A.* or any person claiming under him shall on the day of

44 & 45 VICT. 1882 pay to *B.* and *C.* the sum of £ and interest thereon at  
 c. 41. the rate aforesaid then *B.* and *C.* or the persons claiming under them  
 will at the request and cost of *A.* or the persons claiming under him  
 re-convey the premises to *A.* or the persons claiming under him AND  
*A.* hereby covenants with *B.* as follows [*here add covenant as to fire  
 insurance or other special covenant required*].

In witness, &c.

## II.—Further Charge.

THIS INDENTURE made the day of 18 between  
 [*the same parties as the foregoing mortgage*] and supplemental to an  
 indenture of mortgage dated the day of 18 and made  
 between the same parties for securing the sum of £ and  
 interest at [*four*] per centum per annum on property at [*&c.*] WIT-  
 NESSETH that in consideration of the further sum of £  
 paid to *A.* by *B.* and *C.* out of money belonging to them on a joint  
 account [*add receipt and covenant as in the foregoing mortgage*] and  
 further that all the property comprised in the before-mentioned inden-  
 ture of mortgage shall stand charged with the payment to *B.* and *C.* of  
 the sum of £ and the interest thereon hereinbefore  
 covenanted to be paid as well as the sum of £ and  
 interest secured by the same indenture.

In witness, &c.

## III.—Conveyance on Sale.

THIS INDENTURE made the day of 1883 between *A.* of  
 [*&c.*] of the first part *B.* of [*&c.*] and *C.* of [*&c.*] of the second part and  
*M.* of [*&c.*] of the third part WHEREAS by an indenture dated [*&c.*]  
 and made between [*&c.*] the lands hereinafter mentioned were conveyed  
 by *A.* to *B.* and *C.* in fee simple by way of mortgage for securing  
 £ and interest and by a supplemental indenture dated  
 [*&c.*] and made between the same parties those lands were charged by  
*A.* with the payment to *B.* and *C.* of the further sum of £  
 and interest thereon AND WHEREAS a principal sum of £  
 remains due under the two before-mentioned indentures but all interest  
 thereon has been paid as *B.* and *C.* hereby acknowledge NOW THIS  
 INDENTURE WITNESSETH that in consideration of the sum of £  
 paid by the direction of *A.* to *B.* and *C.* and of the sum of £  
 paid to *A.* those two sums making together the total sum of £  
 paid by *M.* for the purchase of the fee simple of the lands hereinafter  
 mentioned of which sum of £ *B.* and *C.* hereby acknow-  
 ledge the receipt and of which total sum of £ *A.* hereby  
 acknowledges the payment and receipt in manner before mentioned *B.*  
 and *C.* as mortgagees and by the direction of *A.* as beneficial owner  
 hereby convey and *A.* as beneficial owner hereby conveys and confirms  
 to *M.* All that [*&c.*] To hold to and to the use of *M.* in fee simple  
 discharged from all money secured by and from all claims under the  
 before-mentioned indentures [*Add, if required, And A. hereby acknow-  
 ledges the right of M. to production of the documents of title mentioned  
 in the Schedule hereto and to delivery of copies thereof and hereby  
 undertakes for the safe custody thereof*].

In witness, &c.

[The Schedule above referred to.

*To contain list of documents retained by A.]*

## IV.—Marriage Settlement.

THIS INDENTURE made the day of 1882 between  
*John M.* of [*&c.*] of the first part *Jane S.* of [*&c.*] of the second part and *X.*  
 of [*&c.*] and *Y.* of [*&c.*] of the third part WITNESSETH that in considera-

tion of the intended marriage between *John M.* and *Jane S.* *John M.* as settlor hereby conveys to *X.* and *Y.* All that [*&c.*] To hold to *X.* and *Y.* in fee simple to the use of *John M.* in fee simple until the marriage and after the marriage to the use of *John M.* during his life without impeachment of waste with remainder after his death to the use that *Jane S.* if she survives him may receive during the rest of her life a yearly jointure rent charge of £ to commence from his death and to be paid by equal half-yearly payments the first thereof to be made at the end of six calendar months from his death if she is then living or if not a proportional part to be paid at her death and subject to the before-mentioned rentcharge to the use of *X.* and *Y.* for a term of five hundred years without impeachment of waste on the trusts hereinafter declared and subject thereto to the use of the first and other sons of *John M.* and *Jane S.* successively according to seniority in tail male with remainder [*insert here, if thought desirable, to the use of the same first and other sons successively according to seniority in tail with remainder*] to the use of all the daughters of *John M.* and *Jane S.* in equal shares as tenants in common in tail with cross remainders between them in tail with remainder to the use of *John M.* in fee simple. [*Insert trusts of term of 500 years for raising portions; also, if required, power to charge jointure and portions on a future marriage; also powers of sale, exchange, and partition, and other powers and provisions, if and as desired.*]

In witness, &c.

### 45 VICT. c. 15 (*The Commonable Rights Compensation Act, 1882*).

*An Act to provide for the better application of Moneys paid by way of Compensation for the compulsory acquisition of Common Lands and extinguishment of Rights of Common.* [19th June, 1882.]

Whereas under the provisions of the Lands Clauses Consolidation Act, 1845, and of railway and other special Acts of Parliament, money is directed or authorized to be paid to a committee as compensation for the extinction of commonable rights or for lands, being common lands or in the nature thereof, the right to the soil of which belongs to the commoners:

And by the Lands Clauses Consolidation Act, 1845, and by the Inclosure Act, 1852, and the Inclosure Act, 1854, certain powers of apportioning and otherwise dealing with such money are conferred upon any such committee and upon the Inclosure Commissioners for England and Wales (hereinafter called the Commissioners), but such powers are found in practice to be insufficient, and money paid by way of compensation as aforesaid is often in consequence useless to the persons interested therein:

And whereas it is expedient to give such powers of dealing with such compensation money as are hereinafter specified, but such powers cannot be conferred without the sanction of Parliament:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1.—This Act may be cited as the Commonable Rights Compensation Act, 1882.

2.—(1) With respect to any money which has been or hereafter may be paid by any railway or other public company or corporate body or otherwise under the provisions of the Lands Clauses Act and any Act

Application of compensation money for common lands.



45 VICT. c. 15. incorporated therewith, or of any other Act of Parliament to a committee of commoners as compensation for the extinguishment of commonable or other rights or for lands being common lands or in the nature thereof the right to the soil of which may belong to the commoners, the committee (or a majority in number thereof) or, after the expiration of twelve months from the payment of such money to the committee, any three of the persons claiming to be interested in such money may make application in writing to the Commissioners to call a meeting of the persons interested in such money to consider the application thereof, and the Commissioners shall call a meeting accordingly, and at such meeting the majority in number and the majority in respect of interest of the persons present may decide by resolution that such money shall be applied and laid out in one or more of the following ways :

8 & 9 Vict.  
c. 118, etc.

- (a) In the improvement of the remainder of the common land in respect of a portion of which such money has been paid ;
- (b) In defraying the expense of any proceedings under the Metropolitan Commons Acts or under the Inclosure Acts, 1845 to 1878, with reference to a scheme for the local management, or a Provisional Order for the regulation, of such common land, or of any application to Parliament for a Private Bill or otherwise for the preservation and management of such common land as an open space ;
- (c) In defraying the expense of any legal proceedings for the protection of such common land, or the commoners' rights over the same ;
- (d) In the purchase of additional land to be used as common land ;
- (e) In the purchase of land to be used as a recreation ground for the neighbourhood ;

and any such resolution shall bind the minority and all absent parties, and the Commissioners shall make an order under their seal for the payment to them of any expenses incurred by them in relation to the matter, and (subject to such payment) for the application of the money according to such resolution, and the committee or the persons in whose names such money stands or is invested, or the survivors or survivor in account of such persons, or the legal personal representative of such survivor, shall, upon service of any such order of the Commissioners as aforesaid upon them or any of them or any person on their behalf as the Commissioners may direct, pay and apply the said money or realise any security in which the same is invested, and pay and apply the proceeds thereof in manner directed by the said order.

(2) Any land so purchased as aforesaid for use as common land shall be conveyed to and vest in trustees upon trusts for the persons interested, such trustees to be appointed, and such trusts, and the powers and duties of the trustees, and provisions for the appointment of new trustees from time to time to be declared and provided by an order under the seal of the Commissioners, pursuant to resolutions to be passed at a special meeting of the persons interested, convened by the said Commissioners by such majorities as aforesaid.

(3) Every appointment of a new trustee or of new trustees, in pursuance of this Act, shall be subject to confirmation by the Commissioners under their seal, and upon such confirmation the land shall vest in the remaining and the newly appointed trustees without any conveyance.

(4) The Commissioners shall publish such notice of any meeting held under this Act, and frame such rules and give such directions for the conduct of such meetings and the service of orders made by them under this Act as they may deem fit, and may, if they think fit, direct an assistant commissioner appointed by them to preside at any such meeting, and any such meeting may be adjourned from time to time.

(5) Any land so purchased as aforesaid for use as recreation ground



shall be conveyed to and vest in the local authority as specified in the schedule to this Act for the district within which such land is situate, and shall be held and managed by such local authority, subject to and in accordance with the provisions relating to recreation grounds respectively contained in the Inclosure Acts, 1845 to 1878. 45 VICT. c. 15.

3.—Any moneys heretofore paid or hereafter to be paid by any railway or other public company or body corporate or otherwise under the provisions of the Lands Clauses Act, 1845, and any Act incorporated therewith, or of any other Act of Parliament, to any local authority as specified in the schedule to this Act, or to the churchwardens and overseers of a parish in respect of any recreation ground or allotment for field gardens taken under the powers of any such Act or Acts of Parliament shall be applied in manner provided by the Inclosure Acts, 1845 to 1878, as amended by the Commons Act, 1879, with respect to the surplus rents arising from recreation grounds and field gardens respectively. Application of compensation money for recreation grounds and field gardens. 42 & 43 Vict. c. 37.

4.—In any case where money paid by way of compensation as aforesaid has, before the passing of this Act, been applied in any one or more of the ways authorized by this Act, a resolution may be passed, at any meeting of the persons interested, called by the Commissioners in manner provided by this Act, by such majorities as aforesaid approving of such application, and such application shall, upon the allowance of such resolution by the commissioners under their seal, be deemed to have been lawfully made under the provisions of this Act; and the committee or other persons by whom such money has been so applied shall thereupon be discharged from all liability in respect of such money so applied. And the provisions in this Act contained with respect to the declaration of trusts, and the powers and duties of trustees, and the appointment of new trustees, from time to time, shall apply in every case in which such money has, before the passing of this Act, been laid out in the purchase of land. Provision for cases where money paid by way of compensation has already been applied in the manner authorized by this Act.

5.—Copies of all orders made by the Commissioners under this Act shall be deposited and kept in like manner as copies of an award are by the Inclosure Act, 1845, directed to be deposited and kept. Deposit of orders.

6.—This Act shall not extend to the New Forest. Exception of the New Forest.

### SCHEDULE.

Situation of Land.	Local Authority.
Within the Metropolis - - -	The Metropolitan Board of Works.
Not within the Metropolis, but within the district of an urban sanitary authority, as defined by the Public Health Act, 1875, or any Act amending the same.	The urban sanitary authority.
Elsewhere than within the Metropolis or the district of an urban sanitary authority as above defined.	The churchwardens and overseers of the parish.

45 & 46 VICT. C. 21 (*The Places of Worship Sites Amendment Act, 1882*).45 & 46 VICT. *An Act to amend the Places of Worship Sites Act, 1873.*

c. 21.

[12th July, 1882.]

36 & 37 VICT.  
c. 50.

Whereas by the Places of Worship Sites Act, 1873, facilities are afforded for the conveyance of pieces of land not exceeding in quantity one acre for sites for places of religious worship and for burial places, but doubts have been entertained whether conveyances can be made under that Act by corporations and public bodies, and it is expedient to remove such doubts :

And whereas cases have arisen in which tenants for life are unable to make conveyances under the said Act by reason that the person next entitled to the manor or lands for a beneficial interest in fee simple or fee tail is unborn or unascertained ; and it is expedient to grant increased facilities for making such conveyances :

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Conveyance  
of lands by  
corporations  
and other  
public  
bodies.

1.—The Places of Worship Sites Act, 1873, shall be construed as extending to authorize any corporation, ecclesiastical or lay, whether sole or aggregate, and any officers, justices of the peace, trustees, or commissioners holding land for public, ecclesiastical, parochial, charitable, or other purposes or objects, to grant, convey, or enfranchise for the purposes of the Act such quantity of land as therein mentioned: Provided as follows :

(a) An ecclesiastical corporation sole, being below the dignity of a Bishop, shall not make any such grant without the consent in writing of the Bishop of the diocese to whose jurisdiction he is subject :

(b) A municipal corporation shall not make any such grant without the consent in writing of the Commissioners of Her Majesty's Treasury :

(c) Parochial property shall not be so granted without the consent of a majority of the ratepayers and owners of property in the parish to which the property belongs, assembled at a meeting to be convened according to the mode pointed out in the Act of the session held in the fifth and sixth years of the reign of King William the Fourth, chapter 69, intituled "An Actt o facilitate the conveyance of workhouses and other property of parishes, and of incorporations or unions of parishes in England and Wales," and of the Local Government Board and of the guardians of the poor of the parish or of the union comprising the parish, testified by their being parties to the conveyance :

(d) Property held on trust for charitable purposes shall not be so granted without the consent of the Charity Commissioners for England and Wales.

5 & 6 W. 4,  
c. 69.

Power for  
limited  
owner  
in case of  
unborn or  
unascertained re-  
mainderman  
to convey,  
etc.

2.—The said Act shall be construed as extending to authorise any person seised or entitled only for life or lives of or to any manor or lands of freehold tenure to make such grant, conveyance, or enfranchisement as is mentioned in the said Act in cases where the person next entitled to the same for a beneficial interest in remainder in fee simple or fee tail is unborn or unascertained : Provided that no such grant, conveyance, or enfranchisement made by any such person seised only for a life or lives shall be valid unless the person seised or entitled for a beneficial interest for life or lives, or for an estate in fee simple or fee tail (as the case may be) in remainder immediately expectant on the estate of such

unborn or unascertained person of or to such manor or lands (if any, and if legally competent) shall be a party to and shall join in the same; and if there be no such person, or if such person be not legally competent, unless the trustees or trustee (if any) of such manor or lands during the suspense or contingency of the then immediate or expectant estate in fee simple or fee tail in such manor or lands shall in like manner concur.

45 & 46 VICT.  
c. 21.

3.—This Act may be cited as the Places of Worship Sites Amendment Act, 1882.

## 45 & 46 VICT. c. 38 (*The Settled Land Act, 1882*).

*An Act for facilitating Sales, Leases, and other dispositions of Settled Land, and for promoting the execution of Improvements thereon.*  
[10th August, 1882.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

45 & 46 VICT.  
c. 38.

### I.—PRELIMINARY.

#### PRELIMINARY.

1.—(1) This Act may be cited as the Settled Land Act, 1882.

(2) This Act, except where it is otherwise expressed, shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-two, which time is in this Act referred to as the commencement of this Act.

Short title;  
commence-  
ment;  
extent.

(3) This Act does not extend to Scotland.

### II.—DEFINITIONS.

#### DEFINITIONS.

2.—(1) Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires.

Definition of  
settlement,  
tenant for  
life, etc.

(2) An estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir, is for purposes of this Act an estate or interest coming to the settlor or heir under or by virtue of the settlement, and comprised in the subject of the settlement.

(3) Land, and any estate or interest therein, which is the subject of a settlement, is for purposes of this Act settled land, and is, in relation to the settlement, referred to in this Act as the settled land.

(4) The determination of the question whether land is settled land, for purposes of this Act, or not, is governed by the state of facts, and the limitations of the settlement, at the time of the settlement taking effect.

(5) The person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for purposes of this Act the tenant for life of that land, and the tenant for life under that settlement.

(6) If, in any case, there are two or more persons so entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for purposes of this Act.

45 & 46 VICT.  
C. 88.

DEFINITIONS.  
—

(7) A person being tenant for life within the foregoing definitions shall be deemed to be such notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent.

(8) The persons, if any, who are for the time being, under a settlement, trustees with power of sale of settled land, or with power of consent to or approval of the exercise of such a power of sale, or if under a settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act, are for purposes of this Act trustees of the settlement.

(9) Capital money arising under this Act, and receivable for the trusts and purposes of the settlement, is in this Act referred to as capital money arising under this Act.

(10) In this Act—

(i.) Land includes incorporeal hereditaments, also an undivided share in land; income includes rents and profits; and possession includes receipt of income:

(ii.) Rent includes yearly or other rent, and toll, duty, royalty, or other reservation, by the acre, or the ton, or otherwise; and, in relation to rent, payment includes delivery; and fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift:

(iii.) Building purposes include the erecting and the improving of, and the adding to, and the repairing of buildings; and a building lease is a lease for any building purposes or purposes connected therewith:

(iv.) Mines and minerals mean mines and minerals whether already opened or in work or not, and include all minerals and substances in, on, or under the land, obtainable by underground or by surface working; and mining purposes include the sinking and searching for, winning, working, getting, making merchantable, smelting or otherwise converting or working for the purposes of any manufacture, carrying away and disposing of mines and minerals, in or under the settled land, or any other land, and the erection of buildings, and the execution of engineering and other works, suitable for those purposes; and a mining lease is a lease for any mining purposes or purposes connected therewith, and includes a grant or licence for any mining purposes:

(v.) Manor includes lordship, and reputed manor or lordship:

(vi.) Steward includes deputy steward, or other proper officer, of a manor:

(vii.) Will includes codicil, and other testamentary instrument, and a writing in the nature of a will:

(viii.) Securities include stocks, funds, and shares:

(ix.) Her Majesty's High Court of Justice is referred to as the Court:

(x.) The Land Commissioners for England as constituted by this Act are referred to as the Land Commissioners:

(xi.) Person includes corporation.

SALE; EN-  
FRANCHISE-  
MENT; EX-  
CHANGE;  
PARTITION.

### III.—SALE; ENFRANCHISEMENT; EXCHANGE; PARTITION.

#### *General Powers and Regulations.*

#### 3.—A tenant for life—

(i.) May sell the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same; and

(ii.) Where the settlement comprises a manor,—may sell the seignory of any freehold land within the manor, or the freehold and inheritance of any copyhold or customary land, parcel of the

*General  
Powers and  
Regulations.  
Powers to  
tenant for  
life to sell,  
etc.*

manor, with or without any exception or reservation of all or any mines or minerals, or of any rights or powers relative to mining purposes, so as in every such case to effect an enfranchisement; and

(iii.) May make an exchange of the settled land, or any part thereof, for other land, including an exchange in consideration of money paid for equality of exchange; and

(iv.) Where the settlement comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares,—may concur in making partition of the entirety, including a partition in consideration of money paid for equality of partition.

4.—(1) Every sale shall be made at the best price that can reasonably be obtained.

(2) Every exchange and every partition shall be made for the best consideration in land or in land and money that can reasonably be obtained.

(3) A sale may be made in one lot or in several lots, and either by auction or by private contract.

(4) On a sale the tenant for life may fix reserve biddings and buy in at an auction.

(5) A sale, exchange, or partition may be made subject to any stipulations respecting title, or evidence of title or other things.

(6) On a sale, exchange, or partition, any restriction or reservation with respect to building on or other user of land, or with respect to mines and minerals, or with respect to or for the purpose of the more beneficial working thereof, or with respect to any other thing, may be imposed or reserved and made binding, as far as the law permits, by covenant, condition, or otherwise, on the tenant for life and the settled land, or any part thereof, or on the other party and any land sold or given in exchange or on partition to him.

(7) An enfranchisement may be made with or without a re-grant of any right of common or other right, easement, or privilege theretofore appendant or appurtenant to or held or enjoyed with the land enfranchised, or reputed so to be.

(8) Settled land in England shall not be given in exchange for land out of England.

#### *Special Powers.*

5. Where on a sale, exchange, or partition there is an incumbrance affecting land sold or given in exchange or on partition, the tenant for life, with the consent of the incumbrancer, may charge that incumbrance on any other part of the settled land, whether already charged therewith or not, in exoneration of the part sold or so given, and, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, make provision accordingly.

#### IV.—LEASES.

##### *General Powers and Regulations.*

6.—A tenant for life may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding—

(i.) In case of a building lease, ninety-nine years:

(ii.) In case of a mining lease, sixty years:

(iii.) In case of any other lease, twenty-one years.

7.—(1) Every lease shall be by deed, and be made to take effect in possession not later than twelve months after its date.

45 & 46 VICT.  
C. 38.

SALE; EN-  
FRANCHISE-  
MENT; EX-  
CHANGE;  
PARTITION.

*General  
Powers and  
Regulations.*

Regulations  
respecting  
sale, enran-  
chisement,  
exchange,  
and par-  
tition.

*Special  
Powers.*

Transfer of  
incumbran-  
ces on land  
sold, etc.

LEASES.

*General  
Powers and  
Regulations.*

Power for  
tenant for  
life to lease  
for ordinary  
or building  
or mining  
purposes.

Regulations  
respecting

45 & 46 VICT.  
C. 38.

LEASES.

General  
Powers and  
Regulations.

leases  
generally.

Building  
and Mining  
Leases.

Regulations  
respecting  
building  
leases.

Regulations  
respecting  
mining  
leases.

Variation of  
building or  
mining lease  
according to  
circum-

(2) Every lease shall reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case.

(3) Every lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

(4) A counterpart of every lease shall be executed by the lessee and delivered to the tenant for life; of which execution and delivery the execution of the lease by the tenant for life shall be sufficient evidence.

(5) A statement, contained in a lease or in an indorsement thereon, signed by the tenant for life, respecting any matter of fact or of calculation under this Act in relation to the lease, shall, in favour of the lessee and of those claiming under him, be sufficient evidence of the matter stated.

*Building and Mining Leases.*

8.—(1) Every building lease shall be made partly in consideration of the lessee, or some person by whose direction the lease is granted, or some other person, having erected, or agreeing to erect, buildings, new or additional, or having improved or repaired, or agreeing to improve or repair, buildings, or having executed, or agreeing to execute, on the land leased, an improvement authorized by this Act, for or in connection with building purposes.

(2) A peppercorn rent or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years or any less part of the term.

(3) Where the land is contracted to be leased in lots, the entire amount of rent to be ultimately payable may be apportioned among the lots in any manner; save that—

(i.) The annual rent reserved by any lease shall not be less than ten shillings; and

(ii.) The total amount of the rents reserved on all leases for the time being granted shall not be less than the total amount of the rents which, in order that the leases may be in conformity with this Act, ought to be reserved in respect of the whole land for the time being leased; and

(iii.) The rent reserved by any lease shall not exceed one fifth part of the full annual value of the land comprised in that lease with the buildings thereon when completed.

9.—(1) In a mining lease—

(i.) The rent may be made to be ascertainable by or to vary according to the acreage worked, or by or according to the quantities of any mineral or substance gotten, made merchantable, converted, carried away, or disposed of, in or from the settled land, or any other land, or by or according to any facilities given in that behalf; and

(ii.) A fixed or minimum rent may be made payable, with or without power for the lessee, in case the rent, according to acreage or quantity, in any specified period does not produce an amount equal to the fixed or minimum rent, to make up the deficiency in any subsequent specified period, free of rent other than the fixed or minimum rent.

(2) A lease may be made partly in consideration of the lessee having executed, or his agreeing to execute, on the land leased, an improvement authorized by this Act, for or in connection with mining purposes.

10.—(1) Where it is shown to the Court with respect to the district in which any settled land is situate, either—

(i.) That it is the custom for land therein to be leased or granted for building or mining purposes for a longer term or on other con-



ditions than the term or conditions specified in that behalf in this Act, or in perpetuity; or

- (ii.) That it is difficult to make leases or grants for building or mining purposes of land therein, except for a longer term or on other conditions than the term and conditions specified in that behalf in this Act, or except in perpetuity;

the Court may, if it thinks fit, authorize generally the tenant for life to make from time to time leases or grants of or affecting the settled land in that district, or parts thereof, for any term or in perpetuity, at fee-farm or other rents, secured by condition of re-entry, or otherwise, as in the order of the Court expressed, or may, if it thinks fit, authorize the tenant for life to make any such lease or grant in any particular case.

(2) Thereupon the tenant for life, and, subject to any direction in the order of the Court to the contrary, each of his successors in title being a tenant for life, or having the powers of a tenant for life under this Act, may make in any case, or in the particular case, a lease or grant of or affecting the settled land, or part thereof, in conformity with the order.

11.—Under a mining lease, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention is expressed in the settlement, there shall be from time to time set aside, as capital money arising under this Act, part of the rent as follows, namely,—where the tenant for life is impeachable for waste in respect of minerals, three fourth parts of the rent, and otherwise one fourth part thereof, and in every such case the residue of the rent shall go as rents and profits.

#### *Special Powers.*

12.—The leasing power of a tenant for life extends to the making of—

- (i.) A lease for giving effect to a contract entered into by any of his predecessors in title for making a lease, which, if made by the predecessor, would have been binding on the successors in title; and
- (ii.) A lease for giving effect to a covenant of renewal, performance whereof could be enforced against the owner for the time being of the settled land; and
- (iii.) A lease for confirming, as far as may be, a previous lease, being void or voidable; but so that every lease, as and when confirmed, shall be such a lease as might at the date of the original lease have been lawfully granted, under this Act, or otherwise, as the case may require.

#### *Surrenders.*

13.—(1) A tenant for life may accept, with or without consideration, a surrender of any lease of settled land, whether made under this Act or not, in respect of the whole land leased, or any part thereof, with or without an exception of all or any of the mines and minerals therein, or in respect of mines and minerals, or any of them.

(2) On a surrender of a lease in respect of part only of the land or mines and minerals leased, the rent may be apportioned.

(3) On a surrender, the tenant for life may make of the land or mines and minerals surrendered, or of any part thereof, a new or other lease, or new or other leases in lots.

(4) A new or other lease may comprise additional land or mines and minerals, and may reserve any apportioned or other rent.

(5) On a surrender, and the making of a new or other lease, whether for the same or for any extended or other term, and whether or not subject to the same or to any other covenants, provisions, or conditions, the value of the lessee's interest in the lease surrendered may be taken

45 & 46 VICT.  
C. 38.

LEASES.

*Building  
and Mining  
Leases.*

stances of  
district.

Part of  
mining rent  
to be set  
aside.

*Special  
Powers.*

Leasing  
powers for  
special ob-  
jects.

*Surrenders.*

Surrender  
and new  
grant of  
leases.

45 & 46 VICT.  
c. 38.

LEASES.

into account in the determination of the amount of the rent to be reserved, and of any fine to be taken, and of the nature of the covenants, provisions, and conditions to be inserted in the new or other lease.

(6) Every new or other lease shall be in conformity with this Act.

*Copyholds.*

Power to  
grant to  
copyholders  
licences for  
leasing.

14.—(1) A tenant for life may grant to a tenant of copyhold or customary land, parcel of a manor comprised in the settlement, a licence to make any such lease of that land, or of a specified part thereof, as the tenant for life is by this Act empowered to make of freehold land.

(2) The licence may fix the annual value whereon fines, fees, or other customary payments are to be assessed, or the amount of those fines, fees, or payments.

SALES,  
LEASES, AND  
OTHER DIS-  
POSITIONS.

(3) The licence shall be entered on the court rolls of the manor, of which entry a certificate in writing of the steward shall be sufficient evidence.

V.—SALES, LEASES, AND OTHER DISPOSITIONS.

*Mansion  
and Park.*

*Mansion and Park.*

Restriction  
as to man-  
sion house,  
park, etc.

15. Notwithstanding anything in this Act, the principal mansion house on any settled land, and the demesnes thereof, and other lands usually occupied therewith, shall not be sold or leased by the tenant for life, without the consent of the trustees of the settlement, or an order of the Court.

*Streets and  
open Spaces.*

*Streets and open Spaces.*

Dedication  
for streets,  
open spaces,  
etc.

16.—On or in connection with a sale or grant for building purposes, or a building lease, the tenant for life, for the general benefit of the residents on the settled land, or on any part thereof,—

(i.) May cause or require any parts of the settled land to be appropriated and laid out for streets, roads, paths, squares, gardens, or other open spaces, for the use, gratuitously or on payment, of the public or of individuals, with sewers, drains, watercourses, fencing, paving, or other works necessary or proper in connection therewith; and

(ii.) May provide that the parts so appropriated shall be conveyed to or vested in the trustees of the settlement, or other trustees, or any company or public body, on trusts or subject to provisions for securing the continued appropriation thereof to the purposes aforesaid, and the continued repair or maintenance of streets and other places and works aforesaid, with or without provision for appointment of new trustees when required; and

(iii.) May execute any general or other deed necessary or proper for giving effect to the provisions of this section (which deed may be inrolled in the Central Office of the Supreme Court of Judicature), and thereby declare the mode, terms, and conditions of the appropriation, and the manner in which and the persons by whom the benefit thereof is to be enjoyed, and the nature and extent of the privileges and conveniences granted.

*Surface and  
Minerals  
apart.*

*Surface and Minerals apart.*

Separate  
dealing with  
surface and  
minerals,  
with or with-  
out way-  
leaves, etc.

17.—(1) A sale, exchange, partition, or mining lease, may be made either of land, with or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals, and in any such case with or without a grant or reservation of powers of working, wayleaves or rights of way, rights of water and drainage, and other powers, easements, rights and privileges for or incident to or connected with mining



purposes, in relation to the settled land, or any part thereof, or any other land. 45 & 46 VICT.  
c. 38.

(2) An exchange or partition may be made subject to and in consideration of the reservation of an undivided share in mines or minerals.

SALRS,  
LEASES, AND  
OTHER DIS-  
POSITIONS.

### *Mortgage.*

18.—Where money is required for enfranchisement, or for equality of exchange or partition, the tenant for life may raise the same on mortgage of the settled land, or of any part thereof, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, and the money raised shall be capital money arising under this Act. Mortgage.  
Mortgage  
for equality  
money, etc.

### *Undivided Share.*

19.—Where the settled land comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares, the tenant for life of an undivided share may join or concur, in any manner and to any extent necessary or proper for any purpose of this Act, with any person entitled to or having power or right of disposition of or over another undivided share. Undivided  
Share.  
Concurrence  
in exercise of  
powers as to  
undivided  
share.

### *Conveyance.*

20.—(1) On a sale, exchange, partition, lease, mortgage, or charge, the tenant for life may, as regards land sold, given in exchange or on partition, leased, mortgaged, or charged, or intended so to be, including copyhold or customary or leasehold land vested in trustees, or as regards easements or other rights or privileges sold or leased, or intended so to be, convey or create the same by deed, for the estate or interest the subject of the settlement, or for any less estate or interest, to the uses and in the manner requisite for giving effect to the sale, exchange, partition, lease, mortgage, or charge. Conveyance.  
Completion  
of sale,  
lease, etc.,  
by con-  
veyance.

(2) Such a deed, to the extent and in the manner to and in which it is expressed or intended to operate and can operate under this Act, is effectual to pass the land conveyed, or the easements, rights, or privileges created, discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of—

(i.) All estates, interests, and charges having priority to the settlement ; and

(ii.) All such other, if any, estates, interests, and charges as have been conveyed or created for securing money actually raised at the date of the deed ; and

(iii.) All leases and grants at fee-farm rents or otherwise, and all grants of easements, rights of common, or other rights or privileges granted or made for value in money or money's worth, or agreed so to be, before the date of the deed, by the tenant for life, or by any of his predecessors in title, or by any trustees for him or them, under the settlement, or under any statutory power, or being otherwise binding on the successors in title of the tenant for life.

(3) In case of a deed relating to copyhold or customary land, it is sufficient that the deed be entered on the court rolls of the manor, and the steward is hereby required on production to him of the deed to make the proper entry ; and on that production, and on payment of customary fines, fees, and other dues or payments, any person whose title under the deed requires to be perfected by admittance shall be admitted accordingly ; but if the steward so requires, there shall also be produced to him so much of the settlement as may be necessary to show the title of the person executing the deed ; and the same may, if the steward thinks fit, be also entered on the court rolls.

45 & 46 VICT. C. 38. VI.—INVESTMENT OR OTHER APPLICATION OF CAPITAL TRUST MONEY.

INVESTMENT  
OR OTHER  
APPLICA-  
TION OF  
CAPITAL  
TRUST  
MONEY.

Capital  
money  
under Act;  
investment,  
etc., by  
trustees or  
Court.

21.—Capital money arising under this Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes (namely):

- (i.) In investment on Government securities, or on other securities on which the trustees of the settlement are by the settlement or by law authorized to invest trust money of the settlement, or on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock, of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares, with power to vary the investment into or for any other such securities:
- (ii.) In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land-tax, rentcharge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land:
- (iii.) In payment for any improvement authorized by this Act:
- (iv.) In payment for equality of exchange or partition of settled land:
- (v.) In purchase of the seignory of any part of the settled land, being freehold land, or in purchase of the fee simple of any part of the settled land, being copyhold or customary land:
- (vi.) In purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life:
- (vii.) In purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of or in respect of mines or minerals therein, or of or in respect of rights or powers relative to the working of mines or minerals therein, or in other land:
- (viii.) In purchase, either in fee simple, or for a term of sixty years or more, of mines and minerals convenient to be held or worked with the settled land, or of any easement, right, or privilege convenient to be held with the settled land for mining or other purposes:
- (ix.) In payment to any person becoming absolutely entitled or empowered to give an absolute discharge:
- (x.) In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions, of this Act:
- (xi.) In any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder.

Regulations  
respecting  
investment,  
devolution,  
and income  
of securities,  
etc.

22.—(1) Capital money arising under this Act shall, in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into Court, at the option of the tenant for life, and shall be invested or applied by the trustees, or under the direction of the Court, as the case may be, accordingly.

(2) The investment or other application by the trustees shall be made according to the direction of the tenant for life, and in default thereof, according to the discretion of the trustees, but in the last-mentioned case subject to any consent required or direction given by the settlement with respect to the investment or other application by the trustees of trust money of the settlement; and any investment shall be in the names or under the control of the trustees.

(3) The investment or other application under the direction of the Court shall be made on the application of the tenant for life, or of the trustees.

(4) Any investment or other application shall not during the life of the tenant for life be altered without his consent. 45 & 46 VICT. C. 38.

(5) Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall, for all purposes of disposition, transmission, and devolution, be considered as land, and the same shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement. INVESTMENT OR OTHER APPLICATION OF CAPITAL TRUST MONEY.

(6) The income of those securities shall be paid or applied as the income of that land, if not disposed of, would have been payable or applicable under the settlement.

(7) Those securities may be converted into money, which shall be capital money arising under this Act.

23.—Capital money arising under this Act from settled land in England shall not be applied in the purchase of land out of England, unless the settlement expressly authorizes the same. Investment in land in England.

24.—(1) Land acquired by purchase or in exchange, or on partition, shall be made subject to the settlement in manner directed in this section. Settlement of land purchased, taken in exchange, etc.

(2) Freehold land shall be conveyed to the uses, on the trusts, and subject to the powers and provisions which, under the settlement, or by reason of the exercise of any power of charging therein contained, are subsisting with respect to the settled land, or as near thereto as circumstances permit, but not so as to increase or multiply charges or powers of charging.

(3) Copyhold, customary, or leasehold land shall be conveyed to and vested in the trustees of the settlement on trusts and subject to powers and provisions corresponding, as nearly as the law and circumstances permit, with the uses, trusts, powers, and provisions to, on, and subject to which freehold land is to be conveyed as aforesaid; so nevertheless that the beneficial interest in land held by lease for years shall not vest absolutely in a person who is by the settlement made by purchase tenant in tail, or in tail male, or in tail female, and who dies under the age of twenty-one years, but shall, on the death of that person under that age, go as freehold land conveyed as aforesaid would go.

(4) Land acquired as aforesaid may be made a substituted security for any charge in respect of money actually raised, and remaining unpaid, from which the settled land, or any part thereof, or any undivided share therein, has theretofore been released on the occasion and in order to the completion of a sale, exchange, or partition.

(5) Where a charge does not affect the whole of the settled land, then the land acquired shall not be subjected thereto, unless the land is acquired either by purchase with money arising from sale of land which was before the sale subject to the charge, or by an exchange or partition of land which, or an undivided share wherein, was before the exchange or partition subject to the charge.

(6) On land being so acquired, any person who, by the direction of the tenant for life, so conveys the land as to subject it to any charge, is not concerned to inquire whether or not it is proper that the land should be subjected to the charge.

(7) The provisions of this section referring to land extend and apply, as far as may be, to mines and minerals, and to easements, rights, and privileges over and in relation to land.

#### VII.—IMPROVEMENTS.

##### *Improvements with Capital Trust Money.*

25.—Improvements authorized by this Act are the making or execution on, or in connection with, and for the benefit of settled land, of any of Description of improve-

IMPROVE-  
MENTS.

Improve-  
ments with  
Capital  
Trust  
Money.

5 & 46 VICT.  
C. 38.

**IMPROVE-  
MENTS.**

*Improve-  
ments with  
Capital  
Trust  
Money.*

ments autho-  
rised by Act.

the following works, or of any works for any of the following purposes, and any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes (namely):

- (i.) Drainage, including the straightening, widening, or deepening of drains, streams, and watercourses:
- (ii.) Irrigation; warping:
- (iii.) Drains, pipes, and machinery for supply and distribution of sewage as manure:
- (iv.) Embanking or weiring from a river or lake, or from the sea, or a tidal water:
- (v.) Groynes; sea walls; defences against water:
- (vi.) Inclosing; straightening of fences; re-division of fields:
- (vii.) Reclamation; dry warping:
- (viii.) Farm roads; private roads; roads or streets in villages or towns:
- (ix.) Clearing; trenching; planting:
- (x.) Cottages for labourers, farm-servants, and artisans, employed on the settled land or not:
- (xi.) Farmhouses, offices, and out-buildings, and other buildings for farm purposes:
- (xii.) Saw-mills, scutch-mills, and other mills, water-wheels, engine-houses, and kilns, which will increase the value of the settled land for agricultural purposes or as woodland or otherwise:
- (xiii.) Reservoirs, tanks, conduits, watercourses, pipes, wells, ponds, shafts, dams, weirs, sluices, and other works and machinery for supply and distribution of water for agricultural, manufacturing, or other purposes, or for domestic or other consumption:
- (xiv.) Tramways; railways; canals; docks:
- (xv.) Jetties, piers, and landing places on rivers, lakes, the sea, or tidal waters, for facilitating transport of persons and of agricultural stock and produce, and of manure and other things required for agricultural purposes, and of minerals, and of things required for mining purposes:
- (xvi.) Markets and market-places:
- (xvii.) Streets, roads, paths, squares, gardens, or other open spaces for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public, the same being necessary or proper in connection with the conversion of land into building land:
- (xviii.) Sewers, drains, watercourses, pipe-making, fencing, paving, brick-making, tile-making, and other works necessary or proper in connection with any of the objects aforesaid:
- (xix.) Trial pits for mines, and other preliminary works necessary or proper in connection with development of mines:
- (xx.) Reconstruction, enlargement, or improvement of any of those works.

Approval by  
Land Com-  
missioners of  
scheme for  
improve-  
ment and  
payment  
thereon.

26.—(1) Where the tenant for life is desirous that capital money arising under this Act shall be applied in or towards payment for an improvement authorized by this Act, he may submit for approval to the trustees of the settlement, or to the Court, as the case may require, a scheme for the execution of the improvement, showing the proposed expenditure thereon.

(2) Where the capital money to be expended is in the hands of trustees, then, after a scheme is approved by them, the trustees may apply that money in or towards payment for the whole or part of any work or operation comprised in the improvement, on—

- (i.) A certificate of the Land Commissioners certifying that the work or operation, or some specified part thereof, has been properly executed, and what amount is properly payable by the trustees in

respect thereof, which certificate shall be conclusive in favour of the trustees as an authority and discharge for any payment made by them in pursuance thereof; or on

(ii.) A like certificate of a competent engineer or able practical surveyor nominated by the trustees and approved by the Commissioners, or by the Court, which certificate shall be conclusive as aforesaid; or on

(iii.) An order of the Court directing or authorizing the trustees to so apply a specified portion of the capital money.

(3) Where the capital money to be expended is in Court, then, after a scheme is approved by the Court, the Court may, if it thinks fit, on a report or certificate of the Commissioners, or of a competent engineer or able practical surveyor, approved by the Court, or on such other evidence as the Court thinks sufficient, make such order and give such directions as it thinks fit for the application of that money, or any part thereof, in or towards payment for the whole or part of any work or operation comprised in the improvement.

27.—The tenant for life may join or concur with any other person interested in executing any improvement authorized by this Act, or in contributing to the cost thereof.

28.—(1) The tenant for life, and each of his successors in title having, under the settlement, a limited estate or interest only in the settled land, shall, during such period, if any, as the Land Commissioners by certificate in any case prescribe, maintain and repair, at his own expense, every improvement executed under the foregoing provisions of this Act, and where a building or work in its nature insurable against damage by fire is comprised in the improvement, shall insure and keep insured the same, at his own expense, in such amount, if any, as the Commissioners by certificate in any case prescribe.

(2) The tenant for life, or any of his successors as aforesaid, shall not cut down or knowingly permit to be cut down, except in proper thinning, any trees planted as an improvement under the foregoing provisions of this Act.

(3) The tenant for life, and each of his successors as aforesaid, shall from time to time, if required by the Commissioners, on or without the suggestion of any person having, under the settlement, any estate or interest in the settled land in possession, remainder, or otherwise, report to the Commissioners the state of every improvement executed under this Act, and the fact and particulars of fire insurance, if any.

(4) The Commissioners may vary any certificate made by them under this section, in such manner or to such extent as circumstances appear to them to require, but not so as to increase the liabilities of the tenant for life, or any of his successors as aforesaid.

(5) If the tenant for life, or any of his successors as aforesaid, fails in any respect to comply with the requisitions of this section, or does any act in contravention thereof, any person having, under the settlement, any estate or interest in the settled land in possession, remainder, or reversion, shall have a right of action, in respect of that default or act, against the tenant for life; and the estate of the tenant for life, after his death, shall be liable to make good to the persons entitled under the settlement any damages occasioned by that default or act.

#### *Execution and Repair of Improvements.*

29.—The tenant for life, and each of his successors in title having, under the settlement, a limited estate or interest only in the settled land, and all persons employed by or under contract with the tenant for life, or any such successor, may from time to time enter on the settled land, and, without impeachment of waste by any remainderman or reversioner, thereon execute any improvement authorized by this Act, or inspect, maintain, and repair the same, and, for the purposes thereof, on the settled

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C. 38.

IMPROVE  
MENTS.

Improvements with  
Capital  
Trust  
Money.

Concurrence  
in improve-  
ments.

Obligation  
on tenant for  
life and  
successors to  
maintain,  
insure, etc.

Execution  
and Repair  
of Improve-  
ments.

Protection  
as regards  
waste in  
execution  
and repair  
of improve-  
ments.

45 & 46 VICT.  
c. 38.

**IMPROVE-  
MENTS.**

*Improve-  
ment of  
Land Act,  
1864.*

Extension  
of 27 & 28  
Vict. c. 114,  
s. 9.

land, do, make, and use all acts, works, and conveniences proper for the execution, maintenance, repair, and use thereof, and get and work free-stone, limestone, clay, sand, and other substances, and make tramways and other ways, and burn and make bricks, tiles, and other things, and cut down and use timber and other trees not planted or left standing for shelter or ornament.

*Improvement of Land Act, 1864.*

30.—The enumeration of improvements contained in section nine of the Improvement of Land Act, 1864, is hereby extended so as to comprise, subject and according to the provisions of that Act, but only as regards applications made to the Land Commissioners after the commencement of this Act, all improvements authorized by this Act.

**CONTRACTS.**

Power for  
tenant for  
life to enter  
into con-  
tracts.

**VIII.—CONTRACTS.**

31.—(1) A tenant for life—

- (i.) May contract to make any sale, exchange, partition, mortgage, or charge; and
- (ii.) May vary or rescind, with or without consideration, the contract, in the like cases and manner in which, if he were absolute owner of the settled land, he might lawfully vary or rescind the same, but so that the contract as varied be in conformity with this Act; and any such consideration, if paid in money, shall be capital money arising under this Act; and
- (iii.) May contract to make any lease; and in making the lease may vary the terms, with or without consideration, but so that the lease be in conformity with this Act; and
- (iv.) May accept a surrender of a contract for a lease, in like manner and on the like terms in and on which he might accept a surrender of a lease; and thereupon may make a new or other contract, or new or other contracts, for or relative to a lease or leases, in like manner and on the like terms in and on which he might make a new or other lease, or new or other leases, where a lease had been granted; and
- (v.) May enter into a contract for or relating to the execution of any improvement authorized by this Act, and may vary or rescind the same; and
- (vi.) May, in any other case, enter into a contract to do any act for carrying into effect any of the purposes of this Act, and may vary or rescind the same.

(2) Every contract shall be binding on and shall enure for the benefit of the settled land, and shall be enforceable against and by every successor in title for the time being of the tenant for life, and may be carried into effect by any such successor; but so that it may be varied or rescinded by any such successor, in the like case and manner, if any, as if it had been made by himself.

(3) The Court may, on the application of the tenant for life, or of any such successor, or of any person interested in any contract, give directions respecting the enforcing, carrying into effect, varying, or rescinding thereof.

(4) Any preliminary contract under this Act for or relating to a lease shall not form part of the title or evidence of the title of any person to the lease, or to the benefit thereof.

**MISCEL-  
LANEOUS  
PROVISIONS.**

Application  
of money in  
Court under  
Lands  
Clauses and  
other Acts.

**IX.—MISCELLANEOUS PROVISIONS.**

32.—Where, under an Act incorporating or applying, wholly or in part, the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, or under the Settled Estates Act, 1877, or under any other Act, public, local, personal, or private, money is at the commencement of this Act in Court, or is afterwards paid into Court, and is liable to be laid out in the purchase



of land to be made subject to a settlement, then, in addition to any mode of dealing therewith authorized by the Act under which the money is in Court, that money may be invested or applied as capital money arising under this Act, on the like terms, if any, respecting costs and other things, as nearly as circumstances admit, and (notwithstanding anything in this Act) according to the same procedure, as if the modes of investment or application authorized by this Act were authorized by the Act under which the money is in Court.

33.—Where, under a settlement, money is in the hands of trustees, and is liable to be laid out in the purchase of land to be made subject to the settlement, then, in addition to such powers of dealing therewith as the trustees have independently of this Act, they may, at the option of the tenant for life, invest or apply the same as capital money arising under this Act.

34.—Where capital money arising under this Act is purchase money paid in respect of a lease for years, or life, or years determinable on life, or in respect of any other estate or interest in land less than the fee simple, or in respect of a reversion dependent on any such lease, estate, or interest, the trustees of the settlement or the Court, as the case may be, and in the case of the Court on the application of any party interested in that money, may, notwithstanding anything in this Act, require and cause the same to be laid out, invested, accumulated, and paid in such manner as, in the judgment of the trustees or of the Court, as the case may be, will give to the parties interested in that money the like benefit therefrom as they might lawfully have had from the lease, estate, interest, or reversion in respect whereof the money was paid, or as near thereto as may be.

35.—(1) Where a tenant for life is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees of the settlement or an order of the Court, may cut and sell that timber, or any part thereof.

(2) Three fourth parts of the net proceeds of the sale shall be set aside as and be capital money arising under this Act, and the other fourth part shall go as rents and profits.

36.—The Court may, if it thinks fit, approve of any action, defence, petition to Parliament, parliamentary opposition, or other proceeding taken or proposed to be taken for protection of settled land, or of any action or proceeding taken or proposed to be taken for recovery of land being or alleged to be subject to a settlement, and may direct that any costs, charges, or expenses incurred or to be incurred in relation thereto, or any part thereof, be paid out of property subject to the settlement.

37.—(1) Where personal chattels are settled on trust so as to devolve with land until a tenant in tail by purchase is born or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to an estate of freehold of inheritance in the land, a tenant for life of the land may sell the chattels or any of them.

(2) The money arising by the sale shall be capital money arising under this Act, and shall be paid, invested, or applied and otherwise dealt with in like manner in all respects as by this Act directed with respect to other capital money arising under this Act, or may be invested in the purchase of other chattels, of the same or any other nature, which, when purchased, shall be settled and held on the same trusts, and shall devolve in the same manner as the chattels sold.

(3) A sale or purchase of chattels under this section shall not be made without an order of the Court.

#### X.—TRUSTEES.

38.—(1) If at any time there are no trustees of a settlement within the definition in this Act, or where in any other case it is expedient, for

45 & 46 VICT.  
C. 38.

MISCELL-  
LANEOUS  
PROVISIONS.

8 & 9 VICT. C.  
18, 23 & 24  
VICT. C. 106.  
32 & 33 VICT.  
C. 18. 40 & 41  
VICT. C. 18.

Application  
of money in  
hands of  
trustees  
under  
powers of  
settlement.

Application  
of money  
paid for  
lease or  
reversion.

Cutting and  
sale of  
timber, and  
part of pro-  
ceeds to be  
set aside.

Proceedings  
for pro-  
tection or  
recovery of  
land settled  
or claimed  
as settled.

Heirlooms.

TRUSTEES

Appoint-  
ment of

45 & 46 VICT. c. 38.	purposes of this Act, that new trustees of a settlement be appointed, the Court may, if it thinks fit, on the application of the tenant for life or of any other person having, under the settlement, an estate or interest in the settled land, in possession, remainder, or otherwise, or, in the case of an infant, of his testamentary or other guardian, or next friend, appoint fit persons to be trustees under the settlement for purposes of this Act.
TRUSTEES. — trustees by Court.	(2) The persons so appointed, and the survivors and survivor of them, while continuing to be trustees or trustee, and, until the appointment of new trustees, the personal representatives or representative for the time being of the last surviving or continuing trustee, shall for purposes of this Act become and be the trustees or trustee of the settlement.
Number of trustees to act.	39.—(1) Notwithstanding anything in this Act, capital money arising under this Act shall not be paid to fewer than two persons as trustees of a settlement, unless the settlement authorizes the receipt of capital trust money of the settlement by one trustee. (2) Subject thereto, the provisions of this Act referring to the trustees of a settlement apply to the surviving or continuing trustees or trustee of the settlement for the time being.
Trustees' receipts.	40.—The receipt in writing of the trustees of a settlement, or where one trustee is empowered to act, of one trustee, or of the personal representatives or representative of the last surviving or continuing trustee, for any money or securities, paid or transferred to the trustees, trustee, representatives, or representative, as the case may be, effectually discharges the payer or transferor therefrom, and from being bound to see to the application or being answerable for any loss or misapplication thereof, and, in case of a mortgagee or other person advancing money, from being concerned to see that any money advanced by him is wanted for any purpose of this Act, or that no more than is wanted is raised.
Protection of each trustee in- dividually.	41.—Each person who is for the time being trustee of a settlement is answerable for what he actually receives only, notwithstanding his signing any receipt for conformity, and in respect of his own acts, receipts, and defaults only, and is not answerable in respect of those of any other trustee, or of any banker, broker, or other person, or for the insufficiency or deficiency of any securities, or for any loss not happening through his own wilful default.
Protection of trustees generally.	42.—The trustees of a settlement, or any of them, are not liable for giving any consent, or for not making, bringing, taking, or doing any such application, action, proceeding, or thing, as they might make, bring, take, or do; and in case of purchase of land with capital money arising under this Act, or of an exchange, partition, or lease, are not liable for adopting any contract made by the tenant for life, or bound to inquire as to the propriety of the purchase, exchange, partition, or lease, or answerable as regards any price, consideration, or fine, and are not liable to see to or answerable for the investigation of the title, or answerable for a conveyance of land, if the conveyance purports to convey the land in the proper mode, or liable in respect of purchase-money paid by them by direction of the tenant for life to any person joining in the conveyance as a conveying party, or as giving a receipt for the purchase-money, or in any other character, or in respect of any other money paid by them by direction of the tenant for life on the purchase, exchange, partition, or lease.
Trustees' reim- bursement.	43.—The trustees of a settlement may reimburse themselves or pay and discharge out of the trust property all expenses properly incurred by them.
Reference of differences to Court.	44.—If at any time a difference arises between a tenant for life and the trustees of the settlement, respecting the exercise of any of the powers of this Act, or respecting any matter relating thereto, the Court may, on the application of either party, give such directions respecting the matter in difference, and respecting the costs of the application, as the Court thinks fit.



45.—(1) A tenant for life, when intending to make a sale, exchange, partition, lease, mortgage, or charge, shall give notice of his intention in that behalf to each of the trustees of the settlement, by posting registered letters, containing the notice, addressed to the trustees, severally, each at his usual or last known place of abode in the United Kingdom, and shall give like notice to the solicitor for the trustees, if any such solicitor is known to the tenant for life, by posting a registered letter, containing the notice, addressed to the solicitor at his place of business in the United Kingdom, every letter under this section being posted not less than one month before the making by the tenant for life of the sale, exchange, partition, lease, mortgage, or charge, or of a contract for the same.

45 & 46 VICT.  
c. 38.

TRUSTEES.

Notice to  
trustees.

(2) Provided that at the date of notice given the number of trustees shall not be less than two, unless a contrary intention is expressed in the settlement.

(3) A person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any such notice as is required by this section.

COURT;  
LAND COM-  
MISSIONERS;  
PROCEDURE.

#### XI.—COURT; LAND COMMISSIONERS; PROCEDURE.

46.—(1) All matters within the jurisdiction of the Court under this Act shall, subject to the Acts regulating the Court, be assigned to the Chancery Division of the Court.

Regulations  
respecting  
payments  
into Court,  
applications  
etc.

(2) Payment of money into Court effectually exonerates therefrom the person making the payment.

(3) Every application to the Court shall be by petition, or by summons at Chambers.

(4) On an application by the trustees of a settlement notice shall be served in the first instance on the tenant for life.

(5) On any application notice shall be served on such persons, if any, as the Court thinks fit.

(6) The Court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application, and may, if it thinks fit, order that all or any of those costs, charges, or expenses be paid out of property subject to the settlement.

(7) General Rules for purposes of this Act shall be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and may be made accordingly.

39 & 40 VICT.  
c. 59.  
44 & 45 VICT.  
c. 68.

(8) The powers of the Court may, as regards land in the County Palatine of Lancaster, be exercised also by the Court of Chancery of the County Palatine; and Rules for regulating proceedings in that Court shall be from time to time made by the Chancellor of the Duchy of Lancaster, with the advice and consent of a Judge of the High Court acting in the Chancery Division, and of the Vice-Chancellor of the County Palatine.

(9) General Rules, and Rules for the Court of Chancery of the County Palatine, may be made at any time after the passing of this Act, to take effect on or after the commencement of this Act.

(10) The powers of the Court may, as regards land not exceeding in capital value five hundred pounds, or in annual rateable value thirty pounds, and, as regards capital money arising under this Act, and securities in which the same is invested, not exceeding in amount or value five hundred pounds, and as regards personal chattels settled or to be settled, as in this Act mentioned, not exceeding in value five hundred pounds, be exercised by any County Court within the district whereof is situate any part of the land which is to be dealt with in the Court, or from which the capital money to be dealt with in the Court

45 & 46 VICT. arises under this Act, or in connection with which the personal chattels  
c. 38. to be dealt with in the Court are settled.

COURT;  
LAND COM-  
MISSIONERS;  
PROCEDURE.

Payment of  
costs out of  
settled pro-  
perty.

Constitution  
of Land  
Commis-  
sioners;  
their  
powers, etc.

47.—Where the Court directs that any costs, charges, or expenses be paid out of property subject to a settlement, the same shall, subject and according to the directions of the Court, be raised and paid out of capital money arising under this Act, or other money liable to be laid out in the purchase of land to be made subject to the settlement, or out of investments representing such money, or out of income of any such money or investments, or out of any accumulations of income of land, money, or investments, or by means of a sale of part of the settled land in respect whereof the costs, charges, or expenses are incurred, or of other settled land comprised in the same settlement and subject to the same limitations, or by means of a mortgage of the settled land or any part thereof, to be made by such person as the Court directs, and either by conveyance of the fee simple or other estate or interest the subject of the settlement, or by creation of a term, or otherwise, or by means of a charge on the settled land or any part thereof, or partly in one of those modes and partly in another or others, or in any such other mode as the Court thinks fit.

48.—(1) The commissioners now bearing the three several styles of the Inclosure Commissioners for England and Wales, and the Copyhold Commissioners, and the Tithe Commissioners for England and Wales, shall, by virtue of this Act, become and shall be styled the Land Commissioners for England.

(2) The Land Commissioners shall cause one seal to be made with their style as given by this Act; and in the execution and discharge of any power or duty under any Act relating to the three several bodies of commissioners aforesaid, they shall adopt and use the seal and style of the Land Commissioners for England, and no other.

(3) Nothing in the foregoing provisions of this section shall be construed as altering in any respect the powers, authorities, or duties of the Land Commissioners, or as affecting in respect of appointment, salary, pension, or otherwise any of those commissioners, in office at the passing of this Act, or any assistant commissioner, secretary, or other officer or person then in office or employed under them.

(4) All Acts of Parliament, judgments, decrees, or orders of any Court, awards, deeds, and other documents, passed or made before the commencement of this Act, shall be read and have effect as if the Land Commissioners were therein mentioned instead of one or more of the three several bodies of commissioners aforesaid.

(5) All acts, matters, and things commenced by or under the authority of any one or more of the three several bodies of commissioners aforesaid before the commencement of this Act, and not then completed, shall and may be carried on and completed by or under the authority of the Land Commissioners; and the Land Commissioners, for the purpose of prosecuting, or defending, and carrying on any action, suit, or proceeding pending at the commencement of this Act, shall come into the place of any one or more, as the case may require, of the three several bodies of commissioners aforesaid.

(6) The Land Commissioners shall, by virtue of this Act, have, for the purposes of any Act, public, local, personal, or private, passed or to be passed, making provision for the execution of improvements on settled land, all such powers and authorities as they have for the purposes of the Improvement of Land Act, 1864; and the provisions of the last-mentioned Act relating to their proceedings and inquiries, and to authentication of instruments, and to declarations, statements, notices, applications, forms, security for expenses, inspections, and examinations, shall extend and apply, as far as the nature and circumstances of the case admit, to acts and proceedings done or taken by or in relation to the Land Commissioners under any Act making provision as last aforesaid;

27 & 28 VICT.  
c. 114.

and the provisions of any Act relating to fees or to security for costs to be taken in respect of the business transacted under the Acts administered by the three several bodies of commissioners aforesaid shall extend and apply to the business transacted by or under the direction of the Land Commissioners under any Act, public, local, personal, or private, passed or to be passed, by which any power or duty is conferred or imposed on them.

45 & 46 VICT.  
C. 38.

COURT;  
LAND COM-  
MISSIONERS;  
PROCEDURE.

49.—(1) Every certificate and report approved and made by the Land Commissioners under this Act shall be filed in their office.

Filing of  
certificates,  
etc., of Com-  
missioners.

(2) An office copy of any certificate or report so filed shall be delivered out of their office to any person requiring the same, on payment of the proper fee, and shall be sufficient evidence of the certificate or report whereof it purports to be a copy.

RESTRIC-  
TIONS,  
SAVINGS,  
AND  
GENERAL  
PROVISIONS.

## XII.—RESTRICTIONS, SAVINGS, AND GENERAL PROVISIONS.

50.—(1) The powers under this Act of a tenant for life are not capable of assignment or release, and do not pass to a person as being, by operation of law or otherwise, an assignee of a tenant for life, and remain exerciseable by the tenant for life after and notwithstanding any assignment, by operation of law or otherwise, of his estate or interest under the settlement.

Powers not  
assignable;  
contract not  
to exercise  
powers void.

(2) A contract by a tenant for life not to exercise any of his powers under this Act is void.

(3) But this section shall operate without prejudice to the rights of any person being an assignee for value of the estate or interest of the tenant for life; and in that case the assignee's rights shall not be affected without his consent, except that, unless the assignee is actually in possession of the settled land or part thereof, his consent shall not be requisite for the making of leases thereof by the tenant for life, provided the leases are made at the best rent that can reasonably be obtained, without fine, and in other respects are in conformity with this Act.

(4) This section extends to assignments made or coming into operation before or after and to acts done before or after the commencement of this Act; and in this section assignment includes assignment by way of mortgage, and any partial or qualified assignment, and any charge or incumbrance; and assignee has a meaning corresponding with that of assignment.

51.—(1) If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after, the commencement of this Act a provision is inserted purporting or attempting, by way of direction, declaration, or otherwise, to forbid a tenant for life to exercise any power under this Act, or attempting, or tending, or intended, by a limitation, gift, or disposition over of settled land, or by a limitation, gift, or disposition of other real or any personal property, or by the imposition of any condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent him from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising, any power under this Act, that provision, as far as it purports, or attempts, or tends, or is intended to have, or would or might have, the operation aforesaid, shall be deemed to be void.

Prohibition  
or limitation  
against  
exercise of  
powers,  
void.

(2) For the purposes of this section an estate or interest limited to continue so long only as a person abstains from exercising any power shall be and take effect as an estate or interest to continue for the period for which it would continue if that person were to abstain from exercising the power, discharged from liability to determination or cesser by or on his exercising the same.

52.—Notwithstanding anything in a settlement, the exercise by the tenant for life of any power under this Act shall not occasion a forfeiture.

Provision  
against for-  
feiture.

45 & 46 VICT.  
C. 38.

RESTRICTIONS,  
SAVINGS,  
AND  
GENERAL  
PROVISIONS.

Tenant for  
life trustee  
for all  
parties  
interested.

General pro-  
tection of  
purchasers,  
etc.

Exercise of  
powers;  
limitation of  
provisions,  
etc.

Saving for  
other  
powers.

Additional  
or larger  
powers by  
settlement.

LIMITED  
OWNERS  
GENERALLY.

Enumera-  
tion of other  
limited  
owners, to  
have powers  
of tenant for  
life.

53.—A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties.

54.—On a sale, exchange, partition, lease, mortgage, or charge, a purchaser, lessee, mortgagee, or other person dealing in good faith with a tenant for life shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration, or rent, as the case may require, that could reasonably be obtained by the tenant for life, and to have complied with all the requisitions of this Act.

55.—(1) Powers and authorities conferred by this Act on a tenant for life or trustees or the Court or the Land Commissioners are exerciseable from time to time.

(2) Where a power of sale, enfranchisement, exchange, partition, leasing, mortgaging, charging, or other power is exercised by a tenant for life, or by the trustees of a settlement, he and they may respectively execute, make, and do all deeds, instruments, and things necessary or proper in that behalf.

(3) Where any provision in this Act refers to sale, purchase, exchange, partition, leasing, or other dealing, or to any power, consent, payment, receipt, deed, assurance, contract, expenses, act, or transaction, the same shall be construed to extend only (unless it is otherwise expressed) to sales, purchases, exchanges, partitions, leasings, dealings, powers, consents, payments, receipts, deeds, assurances, contracts, expenses, acts, and transactions under this Act.

56.—(1) Nothing in this Act shall take away, abridge, or prejudicially affect any power for the time being subsisting under a settlement, or by statute or otherwise, exerciseable by a tenant for life, or by trustees with his consent, or on his request, or by his direction, or otherwise; and the powers given by this Act are cumulative.

(2) But, in case of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail; and, accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exerciseable for any purpose provided for in this Act.

(3) If a question arises, or a doubt is entertained, respecting any matter within this section, the Court may, on the application of the trustees of the settlement, or of the tenant for life, or of any other person interested, give its decision, opinion, advice, or direction thereon.

57.—(1) Nothing in this Act shall preclude a settlor from conferring on the tenant for life, or the trustees of the settlement, any powers additional to or larger than those conferred by this Act.

(2) Any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in this Act, operate and be exerciseable in the like manner, and with all the like incidents, effects, and consequences, as if they were conferred by this Act, unless a contrary intention is expressed in the settlement.

### XIII.—LIMITED OWNERS GENERALLY.

58.—(1) Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act, as if each of them were a tenant for life as defined in this Act (namely):

(i.) A tenant in tail, including a tenant in tail who is by Act of

Parliament restrained from barring or defeating his estate tail, and although the reversion is in the Crown, and so that the exercise by him of his powers under this Act shall bind the Crown, but not including such a tenant in tail where the land in respect whereof he is so restrained was purchased with money provided by Parliament in consideration of public services :

45 & 46 VICT.  
C. 38.

LIMITED  
OWNERS  
GENERALLY.

- (ii.) A tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue, or in any other event :
- (iii.) A person entitled to a base fee, although the reversion is in the Crown, and so that the exercise by him of his powers under this Act shall bind the Crown :
- (iv.) A tenant for years determinable on life, not holding merely under a lease at a rent :
- (v.) A tenant for the life of another, not holding merely under a lease at a rent :
- (vi.) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose :
- (vii.) A tenant in tail after possibility of issue extinct :
- (viii.) A tenant by the curtesy :
- (ix.) A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event.

(2) In every such case, the provisions of this Act referring to a tenant for life, either as conferring powers on him or otherwise, and to a settlement, and to settled land, shall extend to each of the persons aforesaid, and to the instrument under which his estate or interest arises, and to the land therein comprised.

(3) In any such case any reference in this Act to death as regards a tenant for life shall, where necessary, be deemed to refer to the determination by death or otherwise of such estate or interest as last aforesaid.

INFANTS ;  
MARRIED  
WOMEN ;  
LUNATICS.

#### XIV.—INFANTS; MARRIED WOMEN; LUNATICS.

59.—Where a person, who is in his own right seised of or entitled in possession to land, is an infant, then for purposes of this Act the land is settled land, and the infant shall be deemed tenant for life thereof.

Infant  
absolutely  
entitled to  
be as tenant  
for life.

60.—Where a tenant for life, or a person having the powers of a tenant for life under this Act, is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life under this Act, the powers of a tenant for life under this Act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person and in such manner as the Court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders.

Tenant for  
life, infant.

61.—(1) The foregoing provisions of this Act do not apply in the case of a married woman.

Married  
woman,  
how to be  
affected.

(2) Where a married woman who, if she had not been a married woman, would have been a tenant for life or would have had the powers of a tenant for life under the foregoing provisions of this Act, is entitled for her separate use, or is entitled under any statute, passed or to be passed, for her separate property, or as a femme sole, then she, without her husband, shall have the powers of a tenant for life under this Act.

(3) Where she is entitled otherwise than as aforesaid, then she and



45 & 46 VICT. her husband together shall have the powers of a tenant for life under  
C. 38. this Act.

INFANTS;  
MARRIED  
WOMEN;  
LUNATICS.

(4) The provisions of this Act referring to a tenant for life and a settlement and settled land shall extend to the married woman without her husband, or to her and her husband together, as the case may require, and to the instrument under which her estate or interest arises, and to the land therein comprised.

(5) The married woman may execute, make, and do all deeds, instruments, and things necessary or proper for giving effect to the provisions of this section.

(6) A restraint on anticipation in the settlement shall not prevent the exercise by her of any power under this Act.

Tenant  
for life,  
lunatic.

62.—Where a tenant for life, or a person having the powers of a tenant for life under this Act, is a lunatic, so found by inquisition, the committee of his estate may, in his name and on his behalf, under an order of the Lord Chancellor, or other person intrusted by virtue of the Queen's Sign Manual with the care and commitment of the custody of the persons and estates of lunatics, exercise the powers of a tenant for life under this Act; and the order may be made on the petition of any person interested in the settled land, or of the committee of the estate.

SETTLEMENT  
BY WAY OF  
TRUSTS FOR  
SALE.

#### XV.—SETTLEMENT BY WAY OF TRUSTS FOR SALE.

Provision  
for case of  
trust to sell  
and re-invest  
in land.

63.—(1) Any land, or any estate or interest in land, which under or by virtue of any deed, will, or agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, is subject to a trust or direction for sale of that land, estate, or interest, and for the application or disposal of the money to arise from the sale, or the income of that money, or the income of the land until sale, or any part of that money or income, for the benefit of any person for his life, or any other limited period, or for the benefit of two or more persons concurrently for any limited period, and whether absolutely, or subject to a trust for accumulation of income for payment of debts or other purpose, or to any other restriction, shall be deemed to be settled land, and the instrument or instruments under which the trust arises shall be deemed to be a settlement; and the person for the time being beneficially entitled to the income of the land, estate, or interest aforesaid until sale, whether absolutely or subject as aforesaid, shall be deemed to be tenant for life thereof; or if two or more persons are so entitled concurrently, then those persons shall be deemed to constitute together the tenant for life thereof; and the persons, if any, who are for the time being under the settlement trustees for sale of the settled land, or having power of consent to, or approval of, or control over the sale, or if under the settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act are for purposes of this Act trustees of the settlement.

(2) In every such case the provisions of this Act referring to a tenant for life, and to a settlement, and to settled land, shall extend to the person or persons aforesaid, and to the instrument or instruments under which his or their estate or interest arises, and to the land therein comprised, subject and except as in this section provided (that is to say):

(i.) Any reference in this Act to the predecessors or successors in title of the tenant for life, or to the remaindermen, or reversioners or other persons interested in the settled land, shall be deemed to refer to the persons interested in succession or otherwise in the money to arise from sale of the land or the income of that

- money, or the income of the land, until sale (as the case may require). 45 & 46 VICT. C. 38.
- (ii.) Capital money arising under this Act from the settled land shall not be applied in the purchase of land unless such application is authorized by the settlement in the case of capital money arising thereunder from sales or other dispositions of the settled land, but may, in addition to any other mode of application authorized by this Act, be applied in any mode in which capital money arising under the settlement from any such sale or other disposition is applicable thereunder, subject to any consent required or direction given by the settlement with respect to the application of trust money of the settlement. SETTLEMENT BY WAY OF TRUSTS FOR SALE.
- (iii.) Capital money arising under this Act from the settled land and the securities in which the same is invested, shall not for any purpose of disposition, transmission, or devolution, be considered as land unless the same would, if arising under the settlement from a sale or disposition of the settled land, have been so considered, and the same shall be held in trust for and shall go to the same persons successively in the same manner, and for and on the same estates, interests, and trusts as the same would have gone and been held if arising under the settlement from a sale or disposition of the settled land, and the income of such capital money and securities shall be paid or applied accordingly.
- (iv.) Land of whatever tenure acquired under this Act by purchase, or in exchange, or on partition, shall be conveyed to and vested in the trustees of the settlement, on the trusts, and subject to the powers and provisions which, under the settlement or by reason of the exercise of any power of appointment or charging therein contained, are subsisting with respect to the settled land, or would be so subsisting if the same had not been sold, or as near thereto as circumstances permit, but so as not to increase or multiply charges or powers of charging. LIMITED OWNERS GENERALLY

XVI.—REPEALS.

REPEALS.

- 64.—(1) The enactments described in the schedule to this Act are hereby repealed. Repeal of enactments in schedule
- (2) The repeal by this Act of any enactment shall not affect any right accrued or obligation incurred thereunder before the commencement of this Act; nor shall the same affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, or of any order made, before the commencement of this Act; nor shall the same affect any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this Act.

XVII.—IRELAND.

IRELAND.

- 65.—(1) In the application of this Act to Ireland the foregoing provisions shall be modified as in this section provided. Modifications respecting Ireland.
- (2) The Court shall be Her Majesty's High Court of Justice in Ireland.
- (3) All matters within the jurisdiction of that Court shall, subject to the Acts regulating that Court, be assigned to the Chancery Division of that Court; but General Rules under this Act for Ireland may direct that those matters or any of them be assigned to the Land Judges of that Division.
- (4) Any deed inrolled under this Act shall be inrolled in the Record and Writ Office of that Division.
- (5) General Rules for purposes of this Act for Ireland shall be

- 45 & 46 VICT.  
c. 38.  

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IRELAND.

deemed Rules of Court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, at any time after the passing of this Act, to take effect on or after the commencement of this Act.
- 40 & 41 Vict.  
c. 57.

(6) The several Civil Bill Courts in Ireland shall, in addition to the jurisdiction possessed by them independently of this Act, have and exercise the power and authority exercisable by the Court under this Act, in all proceedings where the property, the subject of the proceedings, does not exceed in capital value five hundred pounds, or in annual value thirty pounds.
- 40 & 41 Vict.  
c. 56.

(7) The provisions of Part II. of the County Officers and Courts (Ireland) Act, 1877, relative to the equitable jurisdiction of the Civil Bill Courts, shall apply to the jurisdiction exercisable by those Courts under this Act.

(8) Rules and Orders for purposes of this Act, as far as it relates to the Civil Bill Courts, may be made at any time after the passing of this Act, to take effect on or after the commencement of this Act, in manner prescribed by section seventy-nine of the County Officers and Courts (Ireland) Act, 1877.

(9) The Commissioners of Public Works in Ireland shall be substituted for the Land Commissioners.

(10) The term for which a lease other than a building or mining lease may be granted shall be not exceeding thirty-five years.

Section 64.

THE SCHEDULE.

REPEALS.

23 & 24 Vict. c. 145. in part.	An Act to give to trustees, mortgagees, and others, certain powers now commonly inserted in settlements, mortgages, and wills	} in part; namely,—  Parts I. and IV. (being so much of the Act as is not repealed by the Conveyancing and Law of Property Act, 1881).
27 & 28 Vict. c. 114. in part.	The Improvement of Land Act, 1864 - in part; namely,— Sections seventeen and eighteen; Section twenty-one, from “either by a party” to “benefice, or” (inclusive); and from “or if the land owner” to “minor or minors” (inclusive); and “or circumstance” (twice): Except as regards Scotland.	
40 & 41 Vict. c. 18. in part.	The Settled Estates Act, 1877 - in part; namely,— Section seventeen.	

45 & 46 VICT. c. 39 (*The Conveyancing Act, 1882*).

- 45 & 46 VICT.  
c. 39.

*An Act for further improving the Practice of Conveyancing; and for other purposes.*  
[10th August, 1882.]
- Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons,



in this present Parliament assembled, and by the authority of the same, 45 & 46 Vict.  
as follows : c. 39.

*Preliminary.*

1.—(1) This Act may be cited as the Conveyancing Act, 1882 ; and the Conveyancing and Law of Property Act, 1881 (in this Act referred to as the Conveyancing Act of 1881), and this Act may be cited together as the Conveyancing Acts, 1881, 1882.

(2) This Act, except where it is otherwise expressed, shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-two, which time is in this Act referred to as the commencement of this Act.

(3) This Act does not extend to Scotland.

(4) In this Act and in the Schedule thereto

(i.) Property includes real and personal property, and any debt, and anything in action, and any other right or interest in the nature of property, whether in possession or not ;

(ii.) Purchaser includes a lessee or mortgagee, or an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for property, and purchase has a meaning corresponding with that of purchaser ;

(iii.) The act of the session of the third and fourth years of King William the Fourth (chapter seventy-four) “for the abolition of Fines and Recoveries, and for the substitution of more simple modes of Assurance” is referred to as the Fines and Recoveries Act ; and the Act of the session of the fourth and fifth years of King William the Fourth (chapter ninety-two) “for the abolition of Fines and Recoveries, and for the substitution of more simple modes of Assurances in Ireland” is referred to as the Fines and Recoveries (Ireland) Act.

*Preliminary.*

Short titles ;  
commence-  
ment ;  
extent ;  
interpreta-  
tion.

44 & 45 Vict.  
c. 41.

3 & 4 Will. 4,  
c. 74.

4 & 5 Will. 4,  
c. 92.

*Searches.*

2.—(1) Where any person requires, for purposes of this section, search to be made in the Central Office of the Supreme Court of Judicature for entries of judgments, deeds, or other matters or documents, whereof entries are required or allowed to be made in that office by any Act described in Part I. of the First Schedule to the Conveyancing Act of 1881, or by any other Act, he may deliver in the office a requisition in that behalf, referring to this section.

(2) Thereupon the proper officer shall diligently make the search required, and shall make and file in the office a certificate setting forth the result thereof ; and office copies of that certificate shall be issued on requisition, and an office copy shall be evidence of the certificate.

(3) In favour of a purchaser, as against persons interested under or in respect of judgments, deeds, or other matters or documents, whereof entries are required or allowed as aforesaid, the certificate, according to the tenour thereof, shall be conclusive, affirmatively or negatively, as the case may be.

(4) Every requisition under this section shall be in writing, signed by the person making the same, specifying the name against which he desires search to be made, or in relation to which he requires an office copy certificate of result of search, and other sufficient particulars ; and the person making any such requisition shall not be entitled to a search, or an office copy certificate, until he has satisfied the proper officer that the same is required for the purposes of this section.

(5) General rules shall be made for purposes of this section, prescribing forms and contents of requisitions and certificates, and regulating the practice of the office, and prescribing, with the concurrence of the Commissioners of Her Majesty's Treasury, the fees to be taken therein ; which Rules shall be deemed Rules of Court within section seventeen of

*Searches.*

Official  
negative and  
other certi-  
ficates of  
searches for  
judgments,  
Crown debts,  
etc.

45 & 46 Vict.  
c. 39.

*Searches.*

39 & 40 Vict.  
c. 59.  
44 & 45 Vict.  
c. 68.

the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and may be made, at any time after the passing of this Act, to take effect on or after the commencement of this Act.

(6) If any officer, clerk, or person employed in the office commits, or is party or privy to, any act of fraud or collusion, or is wilfully negligent, in the making of or otherwise in relation to any certificate or office copy under this section, he shall be guilty of a misdemeanour.

(7) Nothing in this section or in any Rule made thereunder shall take away, abridge, or prejudicially affect any right which any person may have independently of this section to make any search in the office; and every such search may be made as if this section or any such Rule had not been enacted or made.

(8) Where a solicitor obtains an office copy certificate of result of search under this section, he shall not be answerable in respect of any loss that may arise from error in the certificate.

(9) Where the solicitor is acting for trustees, executors, agents, or other persons in a fiduciary position, those persons also shall not be so answerable.

(10) Where such persons obtain such an office copy without a solicitor, they shall also be protected in like manner.

3 & 4 Will. 4,  
c. 74.

(11) Nothing in this section applies to deeds inrolled under the Fines and Recoveries Act, or under any other Act, or under any statutory Rule.

(12) This section does not extend to Ireland.

*Notice.*

Restriction  
on construc-  
tive notice.

*Notice.*

3.—(1) A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless—

(i.) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or

(ii.) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

(2) This section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately; and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.

(3) A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted.

(4) This section applies to purchases made either before or after the commencement of this Act; save that, where an action is pending at the commencement of this Act, the rights of the parties shall not be affected by this section.

*Leases.*

Contract for  
lease not  
part of title  
to lease.

*Leases.*

4.—(1) Where a lease is made under a power contained in a settlement, will, Act of Parliament, or other instrument, any preliminary contract for or relating to the lease shall not, for the purpose of the deduction of title to an intended assign, form part of the title, or evidence of the title, to the lease.

(2) This section applies to leases made either before or after the commencement of this Act.

*Separate Trustees.*

45 & 46 Vict.  
c. 39.

5.—(1) On an appointment of new trustees, a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property; or, if only one trustee was originally appointed, then one separate trustee may so be appointed for the first-mentioned part.

*Separate Trustees.*

Appoint-  
ment of  
separate sets  
of trustees.

(2) This section applies to trusts created either before or after the commencement of this Act.

*Powers.*

*Powers.*

6.—(1) A person to whom any power, whether coupled with an interest or not, is given, may, by deed, disclaim the power; and, after disclaimer, shall not be capable of exercising or joining in the exercise of the power.

Disclaimer  
of power by  
trustees.

(2) On such disclaimer, the power may be exercised by the other or others, or the survivors or survivor of the others, of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power.

(3) This section applies to powers created by instruments coming into operation either before or after the commencement of this Act.

*Married Women.*

*Married Women.*

7.—(1) In section seventy-nine of the Fines and Recoveries Act, and section seventy of the Fines and Recoveries (Ireland) Act, there shall, by virtue of this Act, be substituted for the words "two of the perpetual commissioners, or two special commissioners," the words "one of the perpetual commissioners, or one special commissioner;" and in section eighty-three of the Fines and Recoveries Act, and section seventy-four of the Fines and Recoveries (Ireland) Act, there shall, by virtue of this Act, be substituted for the word "persons" the word "person," and for the word "commissioners" the words "a commissioner;" and all other provisions of those Acts, and all other enactments having reference in any manner to the sections aforesaid, shall be read and have effect accordingly.

Acknow-  
ledgment of  
deeds by  
married  
women.

(2) Where the memorandum of acknowledgment by a married woman of a deed purports to be signed by a person authorized to take the acknowledgment, the deed shall, as regards the execution thereof by the married woman, take effect at the time of acknowledgment, and shall be conclusively taken to have been duly acknowledged.

(3) A deed acknowledged before or after the commencement of this Act by a married woman, before a judge of the High Court of Justice in England or Ireland, or before a judge of a county court in England, or before a chairman in Ireland, or before a perpetual commissioner or a special commissioner, shall not be impeached or impeachable by reason only that such judge, chairman, or commissioner was interested or concerned either as a party, or as solicitor, or clerk to the solicitor for one of the parties, or otherwise, in the transaction giving occasion for the acknowledgment; and General Rules shall be made for preventing any person interested or concerned as aforesaid from taking an acknowledgment; but no such Rule shall make invalid any acknowledgment; and those Rules shall, as regards England, be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and shall, as regards Ireland, be deemed Rules of Court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, for England and Ireland respectively, at any time after the passing of this Act, to take effect on or after the commencement of this Act.

39 & 40 Vict.  
c. 59.  
44 & 45 Vict.  
c. 68.  
40 & 41 Vict.  
c. 57.

45 & 46 Vict.  
c. 38.

Married  
Women.

(4) The enactments described in the Schedule to this Act are hereby repealed.

5 The foregoing provisions of this section, including the repeal therein, apply only to the execution of deeds by married women after the commencement of this Act.

6 Notwithstanding the repeal of any other thing in this section, the certificate, if not lodged before the commencement of this Act, of the taking of an acknowledgment by a married woman of a deed executed before the commencement of this Act, with any affidavit relating thereto, shall be lodged, examined, and filed in the like manner and with the like effects and consequences as if this section had not been enacted.

7 There shall continue to be kept in the proper office of the Supreme Court of Judicature an index to all certificates of acknowledgments of deeds by married women lodged therein, before or after the commencement of this Act, containing the names of the married women and their husbands alphabetically arranged, and the dates of the certificates and of the deeds to which they respectively relate, and other particulars found convenient: and every such certificate lodged after the commencement of this Act shall be entered in the index as soon as may be after the certificate is filed.

8 An office copy of any such certificate filed before or after the commencement of this Act shall be delivered to any person applying for the same: and every such office copy shall be received as evidence of the acknowledgment of the deed to which the certificate refers.

Power of  
Attorney.

Power of Attorney.

Effect of  
power of  
attorney for  
value money  
and other  
purposes.

9—1 If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser,—

(i) The power shall not be revocable at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the donor's marriage, insanity, unsoundness of mind, or bankruptcy of the donor of the power: and

(ii) Any act done at any time by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the donor's marriage, insanity, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened: and

(iii) Neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice of anything done by the donor of the power without the concurrence of the donee of the power, or of the donor's marriage, insanity, unsoundness of mind, or bankruptcy of the donor of the power.

2 This section applies only to powers of attorney created by instruments executed after the commencement of this Act.

Effect of  
power of  
attorney for  
value of the  
land.

9—2 If a power of attorney, whether given for valuable consideration or not, is in the instrument creating the power expressed to be irrevocable for a fixed time, whether specified, not exceeding one year from the date of the instrument, then, in favour of a purchaser,—

(i) The power shall not be revocable for and during that fixed time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the donor's marriage, insanity, unsoundness of mind, or bankruptcy of the donor of the power: and

(ii) Any act done within that fixed time by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee

of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

- (iii.) Neither the donee of the power, nor the purchaser, shall at any time be prejudicially affected by notice either during or after that fixed time of anything done by the donor of the power during that fixed time, without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power within that fixed time.

(2) This section applies only to powers of attorney created by instruments executed after the commencement of this Act.

45 & 46 VICT.  
C. 89.

*Powers of  
Attorney.*

### *Executory Limitations.*

*Executory  
Limitations.*

10.—(1) Where there is a person entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for term of life, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period or time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of twenty-one years, of the class on default or failure whereof the limitation over was to take effect.

(2) This section applies only where the executory limitation is contained in an instrument coming into operation after the commencement of this Act.

Restriction  
on executory  
limitations.

### *Long Terms.*

*Long Terms.*

11.—Section sixty-five of the Conveyancing Act of 1881 shall apply to and include, and shall be deemed to have always applied to and included, every such term as in that section mentioned, whether having as the immediate reversion thereon the freehold or not; but not—

- (i.) Any term liable to be determined by re-entry for condition broken; or

- (ii.) Any term created by sub-demise out of a superior term, itself incapable of being enlarged into a fee simple.

Amendment  
of enactment  
respecting  
long terms.

### *Mortgages.*

*Mortgages.*

12.—The right of the mortgagor, under section fifteen of the Conveyancing Act of 1881, to require a mortgagee, instead of re-conveying, to assign the mortgage debt and convey the mortgaged property to a third person, shall belong to and be capable of being enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer shall prevail over a requisition of the mortgagor, and, as between incumbrancers, a requisition of a prior incumbrancer shall prevail over a requisition of a subsequent incumbrancer.

Re-convey-  
ance on  
mortgage.

### *Saving.*

*Saving.*

13.—The repeal by this Act of any enactment shall not affect any right accrued or obligation incurred thereunder before the commencement of this Act; nor shall the same affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, before the commencement of this Act; nor shall the same affect any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this Act.

Restriction  
on repeals  
in this Act.

45 & 46 VICT.  
c. 39.

*Married  
Women.*

(4) The enactments described in the Schedule to this Act are hereby repealed.

(5) The foregoing provisions of this section, including the repeal therein, apply only to the execution of deeds by married women after the commencement of this Act.

(6) Notwithstanding the repeal or any other thing in this section, the certificate, if not lodged before the commencement of this Act, of the taking of an acknowledgment by a married woman of a deed executed before the commencement of this Act, with any affidavit relating thereto, shall be lodged, examined, and filed in the like manner and with the like effects and consequences as if this section had not been enacted.

(7) There shall continue to be kept in the proper office of the Supreme Court of Judicature an index to all certificates of acknowledgments of deeds by married women lodged therein, before or after the commencement of this Act, containing the names of the married women and their husbands, alphabetically arranged, and the dates of the certificates and of the deeds to which they respectively relate, and other particulars found convenient; and every such certificate lodged after the commencement of this Act shall be entered in the index as soon as may be after the certificate is filed.

(8) An office copy of any such certificate filed before or after the commencement of this Act shall be delivered to any person applying for the same; and every such office copy shall be received as evidence of the acknowledgment of the deed to which the certificate refers.

*Powers of  
Attorney.*

*Powers of Attorney.*

Effect of  
power of  
attorney, for  
value, made  
absolutely  
irrevocable.

8.—(1) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser,—

(i.) The power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power; and

(ii.) Any act done at any time by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

(iii.) Neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice of anything done by the donor of the power, without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power.

(2) This section applies only to powers of attorney created by instruments executed after the commencement of this Act.

Effect of  
power of  
attorney, for  
value or not,  
made irrevocable for  
fixed time.

9.—(1) If a power of attorney, whether given for valuable consideration or not, is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified, not exceeding one year from the date of the instrument, then, in favour of a purchaser,—

(i.) The power shall not be revoked, for and during that fixed time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power; and

(ii.) Any act done within that fixed time, by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee



of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

- (iii.) Neither the donee of the power, nor the purchaser, shall at any time be prejudicially affected by notice either during or after that fixed time of anything done by the donor of the power during that fixed time, without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power within that fixed time.

(2) This section applies only to powers of attorney created by instruments executed after the commencement of this Act.

45 & 46 VICT.  
C. 39.

*Powers of  
Attorney.*

### *Executory Limitations.*

*Executory  
Limitations.*

10.—(1) Where there is a person entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for term of life, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period or time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of twenty-one years, of the class on default or failure whereof the limitation over was to take effect.

Restriction  
on executory  
limitations.

(2) This section applies only where the executory limitation is contained in an instrument coming into operation after the commencement of this Act.

### *Long Terms.*

*Long Terms.*

11.—Section sixty-five of the Conveyancing Act of 1881 shall apply to and include, and shall be deemed to have always applied to and included, every such term as in that section mentioned, whether having as the immediate reversion thereon the freehold or not; but not—

Amendment  
of enactment  
respecting  
long terms.

- (i.) Any term liable to be determined by re-entry for condition broken; or

- (ii.) Any term created by sub-demise out of a superior term, itself incapable of being enlarged into a fee simple.

### *Mortgages.*

*Mortgages.*

12.—The right of the mortgagor, under section fifteen of the Conveyancing Act of 1881, to require a mortgagee, instead of re-conveying, to assign the mortgage debt and convey the mortgaged property to a third person, shall belong to and be capable of being enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer shall prevail over a requisition of the mortgagor, and, as between incumbrancers, a requisition of a prior incumbrancer shall prevail over a requisition of a subsequent incumbrancer.

Re-convey-  
ance on  
mortgage.

### *Saving.*

*Saving.*

13.—The repeal by this Act of any enactment shall not affect any right accrued or obligation incurred thereunder before the commencement of this Act; nor shall the same affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, before the commencement of this Act; nor shall the same affect any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this Act.

Restriction  
on repeals  
in this Act.

1482

THE BILLS OF SALE ACT (1878) AMENDMENT ACT, 1882.

45 & 46 VICT.  
c. 89.

Section 7 (4).

SCHEDULE.

REPEALS.

3 & 4 Will. 4, c. 74. in part.	-	The Fines and Recoveries } Act - - - - - } in part; namely,— Section eighty-four, from and including the words “and the same judge,” to the end of that section. Sections eighty-five to eighty-eight, in- clusive.
4 & 5 Will. 4, c. 92. in part.	-	The Fines and Recoveries } (Ireland) Act - - - } in part; namely,— Section seventy-five, from and including the words “and the same judge,” to the end of that section. Sections seventy-six to seventy-nine, in- clusive.
17 & 18 Vict. c. 75.	-	An Act to remove doubts concerning the due acknowledgments of deeds by married women in certain cases.
41 & 42 Vict. c. 23.	-	The Acknowledgment of Deeds by Married Women (Ireland) Act, 1878.

45 & 46 VICT. C. 43 (*The Bills of Sale Act (1878) Amendment Act, 1882*).

45 & 46 VICT.  
c. 43.

*An Act to amend the Bills of Sale Act, 1878.*  
[18th August, 1882.]

41 & 42 Vict.  
c. 31.

Whereas it is expedient to amend the Bills of Sale Act, 1878:  
Be it enacted by the Queen’s most Excellent Majesty, by and with the  
advice and consent of the Lords spiritual and temporal, and Commons,  
in this present Parliament assembled, and by the authority of the same,  
as follows :

Short title.

1.—This Act may be cited for all purposes as the Bills of Sale Act  
(1878) Amendment Act, 1882; and this Act and the Bills of Sale  
Act, 1878, may be cited together as the Bills of Sale Acts, 1878 and  
1882.

Commence-  
ment of  
Act.

2.—This Act shall come into operation on the first day of November one  
thousand eight hundred and eighty-two, which date is hereinafter referred  
to as the commencement of this Act.

Construction  
of Act.  
41 & 42 Vict.  
c. 81.

3.—The Bills of Sale Act, 1878, is hereinafter referred to as “the  
principal Act,” and this Act shall, so far as is consistent with the tenour  
thereof, be construed as one with the principal Act; but unless the  
context otherwise requires shall not apply to any bill of sale duly  
registered before the commencement of this Act so long as the registration  
thereof is not avoided by non-renewal or otherwise.

The expression “bill of sale,” and other expressions in this Act, have  
the same meaning as in the principal Act, except as to bills of sale or  
other documents mentioned in section four of the principal Act, which  
may be given otherwise than by way of security for the payment of  
money, to which last-mentioned bills of sale and other documents this  
Act shall not apply.

Bill of sale

4.—Every bill of sale shall have annexed thereto or written thereon a



schedule containing an inventory of the personal chattels comprised in the bill of sale; and such bill of sale, save as hereinafter mentioned, shall have effect only in respect of the personal chattels specifically described in the said schedule; and shall be void, except as against the grantor, in respect of any personal chattels not so specifically described.

45 & 46 Vict.  
c. 43.

to have  
schedule of  
property  
attached  
thereto.

5.—Save as hereinafter mentioned, a bill of sale shall be void, except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto of which the grantor was not the true owner at the time of the execution of the bill of sale.

Bill of sale  
not to affect  
after-ac-  
quired pro-  
perty.

6.—Nothing contained in the foregoing sections of this Act shall render a bill of sale void in respect of any of the following things (that is to say):

Exception as  
to certain  
things.

(1) Any growing crops separately assigned or charged where such crops were actually growing at the time when the bill of sale was executed.

(2) Any fixtures separately assigned or charged, and any plant, or trade machinery where such fixtures, plant, or trade machinery are used in, attached to, or brought upon any land, farm, factory, workshop, shop, house, warehouse, or other place in substitution for any of the like fixtures, plant, or trade machinery specifically described in the schedule to such bill of sale.

7.—Personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes:—

Bill of sale  
with power  
to seize  
except in  
certain  
events to  
be void.

(1) If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale and necessary for maintaining the security;

(2) If the grantor shall become a bankrupt, or suffer the said goods or any of them to be distrained for rent, rates, or taxes;

(3) If the grantor shall fraudulently either remove or suffer the said goods, or any of them, to be removed from the premises;

(4) If the grantor shall not, without reasonable excuse, upon demand in writing by the grantee, produce to him his last receipts for rent, rates, and taxes;

(5) If execution shall have been levied against the goods of the grantor under any judgment at law:

Provided that the grantor may within five days from the seizure or taking possession of any chattels on account of any of the above-mentioned causes, apply to the High Court, or to a judge thereof in Chambers, and such Court or judge, if satisfied that by payment of money or otherwise the said cause of seizure no longer exists, may restrain the grantee from removing or selling the said chattels, or may make such other order as may seem just.

8.—Every bill of sale shall be duly attested, and shall be registered under the principal Act within seven clear days after the execution thereof, or if it is executed in any place out of England then within seven clear days after the time at which it would in the ordinary course of post arrive in England if posted immediately after the execution thereof; and shall truly set forth the consideration for which it was given; otherwise such bill of sale shall be void in respect of the personal chattels comprised therein.

Bill of sale  
to be void  
unless at-  
tested and  
registered.

9.—A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed.

Form of bill  
of sale.

10.—The execution of every bill of sale by the grantor shall be attested by one or more credible witness or witnesses, not being a party or parties thereto. So much of section ten of the principal Act as requires that the execution of every bill of sale shall be attested by a solicitor of the

Attestation

# 1484 THE BILLS OF SALE ACT (1878) AMENDMENT ACT, 1882.

45 & 46 VICT. c. 43. Supreme Court, and that the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting witness, is hereby repealed.

Local registration of contents of bills of sale. 11.—Where the affidavit (which under section ten of the principal Act is required to accompany a bill of sale when presented for registration) describes the residence of the person making or giving the same or of the person against whom the process is issued to be in some place outside the London bankruptcy district as defined by the Bankruptcy Act, 1869, or where the bill of sale describes the chattels enumerated therein as being in some place outside the said London bankruptcy district, the registrar under the principal Act shall forthwith and within three clear days after registration in the principal registry, and in accordance with the prescribed directions, transmit an abstract in the prescribed form of the contents of such bill of sale to the county court registrar in whose district such places are situate, and if such places are in the districts of different registrars to each such registrar.

82 & 83 VICT. c. 71, s. 60. Every abstract so transmitted shall be filed, kept, and indexed by the registrar of the county court in the prescribed manner, and any person may search, inspect, make extracts from and obtain copies of the abstract so registered in the like manner and upon the like terms as to payment or otherwise as near as may be as in the case of bills of sale registered by the registrar under the principal Act.

Bill of sale under 30*l.* to be void. 12.—Every bill of sale made or given in consideration of any sum under thirty pounds shall be void.

Chattels not to be removed or sold. 13.—All personal chattels seized or of which possession is taken after the commencement of this Act, under or by virtue of any bill of sale (whether registered before or after the commencement of this Act), shall remain on the premises where they were so seized or so taken possession of, and shall not be removed or sold until after the expiration of five clear days from the day they were so seized or so taken possession of.

Bill of sale not to protect chattels against poor and parochial rates. 14.—A bill of sale to which this Act applies shall be no protection in respect of personal chattels included in such bill of sale which but for such bill of sale would have been liable to distress under a warrant for the recovery of taxes and poor and other parochial rates.

Repeal of part of Bills of Sale Act, 1878. 15.—The eighth and the twentieth sections of the principal Act, and also all other enactments contained in the principal Act which are inconsistent with this Act are repealed, but this repeal shall not affect the validity of anything done or suffered under the principal Act before the commencement of this Act.

Inspection of registered bills of sale. 16.—So much of the sixteenth section of the principal Act as enacts that any person shall be entitled at all reasonable times to search the register and every registered bill of sale upon payment of one shilling for every copy of a bill of sale inspected is hereby repealed, and from and after the commencement of this Act any person shall be entitled at all reasonable times to search the register, on payment of a fee of one shilling, or such other fee as may be prescribed, and subject to such regulations as may be prescribed, and shall be entitled at all reasonable times to inspect, examine, and make extracts from any and every registered bill of sale without being required to make a written application, or to specify any particulars in reference thereto, upon payment of one shilling for each bill of sale inspected, and such payment shall be made by a judicature stamp: Provided that the said extracts shall be limited to the dates of execution, registration, renewal of registration, and satisfaction, to the names, addresses, and occupations of the parties, to the amount of the consideration, and to any further prescribed particulars.

Debentures to which Act not to apply. 17.—Nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital stock or goods, chattels, and effects of such company.

Extent of Act. 18.—This Act shall not extend to Scotland or Ireland.

## SCHEDULE.

45 & 46 VICT.  
C. 48.

## FORM OF BILL OF SALE.

This indenture made the \_\_\_\_\_ day of \_\_\_\_\_ between *A.B.* of \_\_\_\_\_ of the one part, and *C.D.* of \_\_\_\_\_ of the other part, witnesseth that in consideration of the sum of £ \_\_\_\_\_ now paid to *A.B.* by *C.D.*, the receipt of which the said *A.B.* hereby acknowledges [*or whatever else the consideration may be*], he the said *A.B.* doth hereby assign unto *C.D.*, his executors, administrators, and assigns, all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of £ \_\_\_\_\_, and interest thereon at the rate of \_\_\_\_\_ per cent. per annum [*or whatever else may be the rate*]. And the said *A.B.* doth further agree and declare that he will duly pay to the said *C.D.* the principal sum aforesaid, together with the interest then due, by equal payments of £ \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ [*or whatever else may be the stipulated times or time of payment*]. And the said *A.B.* doth also agree with the said *C.D.* that he will [*here insert terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security*].

Provided always, that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said *C.D.* for any cause other than those specified in section seven of the Bills of Sale Act (1878) Amendment Act, 1882.

In witness, etc.

Signed and sealed by the said *A.B.* in the presence of me *E.F.* [*add witness' name, address, and description*].

### 45 & 46 VICT. C. 75 (*The Married Women's Property Act, 1882*).

*An Act to consolidate and amend the Acts relating to the Property of Married Women.* 45 & 46 VICT.  
[18th August, 1882.] C. 75.

Whereas it is expedient to consolidate and amend the Act of the thirty-third and thirty-fourth Victoria, chapter ninety-three, intituled "The Married Women's Property Act, 1870," and the Act of the thirty-seventh and thirty-eighth Victoria, chapter fifty, intituled "An Act to amend the Married Women's Property Act (1870)":

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1.—(1) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a femme sole, without the intervention of any trustee. Married woman to be capable of holding property and of contracting as a femme sole.

(2) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a femme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

45 & 46 VICT.  
C. 75.

(3) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown.

(4) Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire.

(5) Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a femme sole.

Property of  
a woman  
married  
after the  
Act to be  
held by her  
as a femme  
sole.

2.—Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.

Loans by  
wife to  
husband.

3.—Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied.

Execution  
of general  
power.

4.—The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act.

Property  
acquired  
after the Act  
by a woman  
married be-  
fore the Act  
to be held by  
her as a  
femme sole.

5.—Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid.

As to stock,  
etc., to which  
a married  
woman is  
entitled.

6.—All deposits in any post office or other savings bank, or in any other bank, all annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, and all sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England, or of any other bank, which at the commencement of this Act are standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of this Act are standing in her name, shall be deemed, unless and until the contrary be shown, to be the separate property of such married woman; and the fact that any such deposit, annuity, sum forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England or of any other bank, share, stock, debenture, debenture stock, or other interest as aforesaid, is standing in the sole name of a married woman, shall be sufficient *prima facie* evidence that she is beneficially entitled thereto for her separate use, so as to authorise and empower her to receive or transfer the same, and to receive the dividends, interest, and profits thereof, without the concurrence of her husband, and to indemnify the Postmaster General, the

Commissioners for the Reduction of the National Debt, the Governor and Company of the Bank of England, the Governor and Company of the Bank of Ireland, and all directors, managers, and trustees of every such bank, corporation, company, public body, or society as aforesaid, in respect thereof.

45 & 46 VICT.  
c. 75.

7.—All sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, and all such deposits and annuities respectively as are mentioned in the last preceding section, and all shares, stock, debentures, debenture stock, and other interests of or in any such corporation, company, public body, or society as aforesaid, which after the commencement of this Act shall be allotted to or placed, registered, or transferred in or into or made to stand in the sole name of any married woman shall be deemed, unless and until the contrary be shown, to be her separate property, in respect of which so far as any liability may be incident thereto her separate estate shall alone be liable, whether the same shall be so expressed in the document whereby her title to the same is created or certified, or in the books or register wherein her title is entered or recorded, or not.

As to stock, etc., to be transferred, etc., to a married woman.

Provided always, that nothing in this Act shall require or authorise any corporation or joint stock company to admit any married woman to be a holder of any shares or stock therein to which any liability may be incident, contrary to the provisions of any Act of Parliament, charter, byelaw, articles of association, or deed of settlement regulating such corporation or company.

8.—All the provisions hereinbefore contained as to deposits in any post office or other savings bank, or in any other bank, annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, shares, stock, debentures, debenture stock, or other interests of or in any such corporation, company, public body, or society as aforesaid respectively, which at the commencement of this Act shall be standing in the sole name of a married woman, or which, after that time, shall be allotted to, or placed, registered, or transferred to or into, or made to stand in, the sole name of a married woman, shall respectively extend and apply, so far as relates to the estate, right, title, or interest of the married woman, to any of the particulars aforesaid which, at the commencement of this Act, or at any time afterwards, shall be standing in, or shall be allotted to, placed, registered, or transferred to or into, or made to stand in, the name of any married woman jointly with any persons or person other than her husband.

Investments in joint names of married women and others.

9.—It shall not be necessary for the husband of any married woman, in respect of her interest, to join in the transfer of any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society as aforesaid, which is now or shall at any time hereafter be standing in the sole name of any married woman, or in the joint names of such married woman and any other person or persons not being her husband.

As to stock, etc., standing in the joint names of a married woman and others.

10.—If any investment in any such deposit or annuity as aforesaid, or in any of the public stocks or funds, or in any other stocks or funds transferable as aforesaid, or in any share, stock, debenture, or debenture stock of any corporation, company, or public body, municipal, commercial, or otherwise, or in any share, debenture, benefit, right, or claim whatsoever in, to, or upon the funds of any industrial, provident, friendly, benefit, building, or loan society, shall have been made by a married woman by means of moneys of her husband, without his consent,

Fraudulent investments with money of husband.



45 & 46 Vict.  
c. 75.

the Court may, upon an application under section seventeen of this Act, order such investment, and the dividends thereof, or any part thereof, to be transferred and paid respectively to the husband; and nothing in this Act contained shall give validity as against creditors of the husband to any gift, by a husband to his wife, of any property, which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his creditors; but any moneys so deposited or invested may be followed as if this Act had not passed.

Moneys payable under policy of assurance not to form part of estate of the insured.

11.—A married woman may by virtue of the power of making contracts hereinbefore contained effect a policy upon her own life or the life of her husband for her separate use; and the same and all benefit thereof shall enure accordingly.

A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts: Provided, that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid. The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured and his or her legal personal representatives, in trust for the purposes aforesaid. If, at the time of the death of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by any Court having jurisdiction under the provisions of the Trustee Act, 1850, or the Acts amending and extending the same. The receipt of a trustee or trustees duly appointed, or, in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representative of the insured shall be a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or in part.

13 & 14 Vict.  
c. 60.

Remedies of married woman for protection and security of separate property.

12.—Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a femme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together,

concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife. 45 & 46 VICT.  
c. 75.

13.—A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the Acts relating to joint stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract, or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed or otherwise, if this Act had not passed. Wife's ante-nuptial debts and liabilities.

14.—A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the Acts relating to joint stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been bona fide recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any Court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property: Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act for or in respect of any such debt or other liability of his wife as aforesaid. Husband to be liable for his wife's debts contracted before marriage to a certain extent.

15.—A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only. Suits for ante-nuptial liabilities.

45 & 46 Vict.  
c. 75.

Act of wife  
liable to cri-  
minal pro-  
ceedings.

Questions  
between hus-  
band and  
wife as to  
property to  
be decided  
in a sum-  
mary way.

16.—A wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband.

17.—In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society as aforesaid in whose books any stocks, funds, or shares of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland, according as such property is in England or Ireland, or (at the option of the applicant irrespectively of the value of the property in dispute) in England to the judge of the county court of the district, or in Ireland to the chairman of the civil bill court of the division in which either party resides, and the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court (as the case may be) may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit: Provided always, that any order of a judge of the High Court of Justice to be made under the provisions of this section shall be subject to appeal in the same way as an order made by the same judge in a suit pending or on an equitable plaint in the said court would be; and any order of a county or civil bill court under the provisions of this section shall be subject to appeal in the same way as any other order made by the same court would be, and all proceedings in a county court or civil bill court under this section in which, by reason of the value of the property in dispute, such court would not have had jurisdiction if this Act or the Married Women's Property Act, 1870, had not passed, may, at the option of the defendant or respondent to such proceedings, be removed as of right into the High Court of Justice in England or Ireland (as the case may be), by writ of certiorari or otherwise as may be prescribed by any rule of such High Court; but any order made or act done in the course of such proceedings prior to such removal shall be valid, unless order shall be made to the contrary by such High Court: Provided also, that the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court, if either party so require, may hear any such application in his private room: Provided also, that any such bank, corporation, company, public body, or society as aforesaid, shall, in the matter of any such application for the purposes of costs or otherwise, be treated as a stakeholder only.

Married  
woman as an  
executrix or  
trustee.

18.—A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a femme sole.

Saving of  
existing  
settlements,  
and the  
power to  
make future  
settlements.

19.—Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument, but no restriction



against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors.

45 & 46 VICT.  
c. 75.

20.—Where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in petty sessions assembled, upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband out of such separate property as by the thirty-third section of the Poor Law Amendment Act, 1868, they may now make and enforce against a husband for the maintenance of his wife if she becomes chargeable to any union or parish. Where in Ireland relief is given under the provisions of the Acts relating to the relief of the destitute poor to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall be given, and shall be recoverable from such woman as if she were a femme sole by the same actions and proceedings as money lent.

Married woman to be liable to the parish for the maintenance of her husband.

31 & 32 Vict.  
c. 122.

21.—A married woman having separate property shall be subject to all such liability for the maintenance of her children and grandchildren as the husband is now by law subject to for the maintenance of her children and grandchildren: Provided always, that nothing in this Act shall relieve her husband from any liability imposed upon him by law to maintain her children or grandchildren.

Married woman to be liable to the parish for the maintenance of her children.

22.—The Married Women's Property Act, 1870, and the Married Women's Property Act, 1870, Amendment Act, 1874, are hereby repealed: Provided that such repeal shall not affect any act done or right acquired while either of such Acts was in force, or any right or liability of any husband or wife, married before the commencement of this Act, to sue or be sued under the provisions of the said repealed Acts or either of them, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act.

Repeal of  
33 & 34 Vict.  
c. 93.  
37 & 38 Vict.  
c. 50.

23.—For the purposes of this Act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living.

Legal representative of married woman.

24.—The word "contract" in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word "property" in this Act includes a thing in action.

Interpretation of terms.

25.—The date of the commencement of this Act shall be the first of January one thousand eight hundred and eighty-three.

Commencement of Act.  
Extent of Act.

26.—This Act shall not extend to Scotland.

27.—This Act may be cited as the Married Women's Property Act, 1882.

Short title.

46 & 47 VICT. c. 52 (*The Bankruptcy Act, 1883*).46 & 47 VICT.  
c. 52.*An Act to amend and consolidate the Law of Bankruptcy.*  
[25th August, 1883.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows :

*Preliminary.*

- Short title. 1.—This Act may be cited as the Bankruptcy Act, 1883.
- Extent of Act. 2.—This Act shall not, except so far as is expressly provided, extend to Scotland or Ireland.
- Commencement of Act. 3.—This Act shall, except as by this Act otherwise provided, commence and come into operation from and immediately after the thirty-first day of December one thousand eight hundred and eighty-three.

## PART I.

## PROCEEDINGS FROM ACT OF BANKRUPTCY TO DISCHARGE.

*Acts of Bankruptcy.*

- Acts of bankruptcy. 4.—(1) A debtor commits an act of bankruptcy in each of the following cases :—
- (a) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally :
  - (b) If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof :
  - (c) If in England or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon which would under this or any other Act be void as a fraudulent preference if he were adjudged bankrupt :
  - (d) If with intent to defeat or delay his creditors he does any of the following things, namely, departs out of England, or being out of England remains out of England, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house :
  - (e) If execution issued against him has been levied by seizure and sale of his goods under process in an action in any Court, or in any civil proceeding in the High Court :
  - (f) If he files in the Court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself :
  - (g) If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England, or by leave of the Court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim set off or cross demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained :
  - (h) If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts.

(2) A bankruptcy notice under this Act shall be in the prescribed form, and shall state the consequences of non-compliance therewith, and shall be served in the prescribed manner. 46 & 47 Vict.  
c. 52.

*Receiving Order.*

5.—Subject to the conditions hereinafter specified, if a debtor commits an act of bankruptcy the Court may, on a bankruptcy petition being presented either by a creditor or by the debtor, make an order, in this Act called a receiving order, for the protection of the estate. Jurisdiction  
to make  
receiving  
order.

6.—(1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless— Conditions  
on which  
creditor may  
petition.

(a) The debt owing by the debtor to the petitioning creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to the several petitioning creditors, amounts to fifty pounds, and

(b) The debt is a liquidated sum, payable either immediately or at some certain future time, and

(c) The act of bankruptcy on which the petition is grounded has occurred within three months before the presentation of the petition, and

(d) The debtor is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England.

(2) If the petitioning creditor is a secured creditor, he must, in his petition, either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt, or give an estimate of the value of his security. In the latter case, he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him, after deducting the value so estimated in the same manner as if he were an unsecured creditor.

7.—(1) A creditor's petition shall be verified by affidavit of the creditor, or of some person on his behalf having knowledge of the facts, and served in the prescribed manner. Proceedings  
and order  
on creditor's  
petition.

(2) At the hearing the Court shall require proof of the debt of the petitioning creditor of the service of the petition, and of the act of bankruptcy, or, if more than one act of bankruptcy is alleged in the petition, of some one of the alleged acts of bankruptcy, and, if satisfied with the proof, may make a receiving order in pursuance of the petition.

(3) If the Court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the Court may dismiss the petition.

(4) When the act of bankruptcy relied on is non-compliance with a bankruptcy notice to pay, secure, or compound for a judgment debt, the Court may, if it thinks fit, stay or dismiss the petition on the ground that an appeal is pending from the judgment.

(5) Where the debtor appears on the petition, and denies that he is indebted to the petitioner, or that he is indebted to such an amount as would justify the petitioner in presenting a petition against him, the Court, on such security (if any) being given as the Court may require for payment to the petitioner of any debt which may be established against him in due course of law, and of the costs of establishing the debt, may instead of dismissing the petition stay all proceedings on the petition for such time as may be required for trial of the question relating to the debt.

(6) Where proceedings are stayed, the Court may, if by reason of the delay caused by the stay of proceedings or for any other cause it thinks just, make a receiving order on the petition of some other creditor, and

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shall thereupon dismiss, on such terms as it thinks just, the petition in which proceedings have been stayed as aforesaid.

(7) A creditor's petition shall not, after presentment, be withdrawn without the leave of the Court.

Debtor's  
petition and  
order  
thereon.

8.—(1) A debtor's petition shall allege that the debtor is unable to pay his debts, and the presentation thereof shall be deemed an act of bankruptcy without the previous filing by the debtor of any declaration of inability to pay his debts, and the Court shall thereupon make a receiving order.

(2) A debtor's petition shall not, after presentment, be withdrawn without the leave of the Court.

Effect of  
receiving  
order.

9.—(1) On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the Court and on such terms as the Court may impose.

(2) But this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed.

Discretion-  
ary powers  
as to appoint-  
ment of re-  
ceiver and  
stay of pro-  
ceedings.

10.—(1) The Court may, if it is shown to be necessary for the protection of the estate, at any time after the presentation of a bankruptcy petition, and before a receiving order is made, appoint the official receiver to be interim receiver of the property of the debtor, or of any part thereof, and direct him to take immediate possession thereof or of any part thereof.

(2) The Court may at any time after the presentation of a bankruptcy petition stay any action, execution, or other legal process against the property or person of the debtor, and any Court in which proceedings are pending against a debtor may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue on such terms as it may think just.

Service of  
order  
staying pro-  
ceedings.

11.—Where the Court makes an order staying any action or proceeding, or staying proceedings generally, the order may be served by sending a copy thereof, under the seal of the Court, by prepaid post letter to the address for service of the plaintiff or other party prosecuting such proceeding.

Power to  
appoint  
special  
manager.

12.—(1) The official receiver of a debtor's estate may, on the application of any creditor or creditors, and if satisfied that the nature of the debtor's estate or business or the interests of the creditors generally require the appointment of a special manager of the estate or business other than the official receiver, appoint a manager thereof accordingly to act until a trustee is appointed, and with such powers (including any of the powers of a receiver) as may be intrusted to him by the official receiver.

(2) The special manager shall give security and account in such manner as the Board of Trade may direct.

(3) The special manager shall receive such remuneration as the creditors may, by resolution at an ordinary meeting, determine, or in default of any such resolution, as may be prescribed.

Advertise-  
ment of  
receiving  
order.

13.—Notice of every receiving order, stating the name, address, and description of the debtor, the date of the order, the Court by which the order is made, and the date of the petition, shall be gazetted and advertised in a local paper in the prescribed manner.

Power to  
Court to  
annul re-  
ceiving order  
in certain  
cases.

14.—If in any case where a receiving order has been made on a bankruptcy petition it shall appear to the Court by which such order was made, upon an application by the official receiver, or any creditor or other person interested, that a majority of the creditors in number and value

are resident in Scotland or in Ireland, and that from the situation of the property of the debtor, or other causes, his estate and effects ought to be distributed among the creditors under the Bankrupt or Insolvent Laws of Scotland or Ireland, the said Court, after such inquiry as to it shall seem fit, may rescind the receiving order and stay all proceedings on, or dismiss the petition upon such terms, if any, as the Court may think fit.

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*Proceedings consequent on Order.*

15.—(1) As soon as may be after the making of a receiving order against a debtor a general meeting of his creditors (in this Act referred to as the first meeting of creditors) shall be held for the purpose of considering whether a proposal for a composition or scheme of arrangement shall be entertained, or whether it is expedient that the debtor shall be adjudged bankrupt, and generally as to the mode of dealing with the debtor's property.

First and other meetings of creditors.

(2) With respect to the summoning of and proceedings at the first and other meetings of creditors, the rules in the First Schedule shall be observed.

16.—(1) Where a receiving order is made against a debtor, he shall make out and submit to the official receiver a statement of and in relation to his affairs in the prescribed form, verified by affidavit, and showing the particulars of the debtor's assets, debts, and liabilities, the names, residences, and occupations of his creditors, the securities held by them respectively, the dates when the securities were respectively given, and such further or other information as may be prescribed or as the official receiver may require.

Debtor's statement of affairs.

(2) The statement shall be so submitted within the following times, namely:

- (i.) If the order is made on the petition of the debtor, within three days from the date of the order;
- (ii.) If the order is made on the petition of a creditor, within seven days from the date of the order.

But the Court may, in either case, for special reasons, extend the time.

(3) If the debtor fails without reasonable excuse to comply with the requirements of this section, the Court may, on the application of the official receiver, or of any creditor, adjudge him bankrupt.

(4) Any person stating himself in writing to be a creditor of the bankrupt may, personally or by agent, inspect this statement at all reasonable times, and take any copy thereof or extract therefrom, but any person untruthfully so stating himself to be a creditor shall be guilty of a contempt of Court, and shall be punishable accordingly on the application of the trustee or official receiver.

*Public Examination of Debtor.*

17.—(1) Where the Court makes a receiving order it shall hold a public sitting, on a day to be appointed by the Court, for the examination of the debtor, and the debtor shall attend thereat, and shall be examined as to his conduct, dealings, and property.

Public examination of debtor.

(2) The examination shall be held as soon as conveniently may be after the expiration of the time for the submission of the debtor's statement of affairs.

(3) The Court may adjourn the examination from time to time.

(4) Any creditor who has tendered a proof, or his representative authorized in writing, may question the debtor concerning his affairs and the causes of his failure.

(5) The official receiver shall take part in the examination of the debtor; and for the purpose thereof, if specially authorised by the Board of Trade, may employ a solicitor with or without counsel.

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C. 52.

(6) If a trustee is appointed before the conclusion of the examination he may take part therein.

(7) The Court may put such questions to the debtor as it may think expedient.

(8) The debtor shall be examined upon oath, and it shall be his duty to answer all such questions as the Court may put or allow to be put to him. Such notes of the examination as the Court thinks proper shall be taken down in writing, and shall be read over to and signed by the debtor, and may thereafter be used in evidence against him; they shall also be open to the inspection of any creditor at all reasonable times.

(9) When the Court is of opinion that the affairs of the debtor have been sufficiently investigated, it shall, by order, declare that his examination is concluded, but such order shall not be made until after the day appointed for the first meeting of creditors.

*Composition or Scheme of Arrangement.*

Power for  
creditors to  
accept and  
Court to ap-  
prove com-  
position or  
arrange-  
ment.

18.—(1) The creditors may at the first meeting or any adjournment thereof, by special resolution, resolve to entertain a proposal for a composition in satisfaction of the debts due to them from the debtor, or a proposal for a scheme of arrangement of the debtor's affairs.

(2) The composition or scheme shall not be binding on the creditors unless it is confirmed by a resolution passed (by a majority in number representing three fourths in value of all the creditors who have proved) at a subsequent meeting of the creditors, and is approved by the Court.

Any creditor who has proved his debt may assent to or dissent from such composition or scheme by a letter addressed to the official receiver in the prescribed form, and attested by a witness, so as to be received by such official receiver not later than the day preceding such subsequent meeting, and such creditor shall be taken as being present and voting at such meeting.

(3) The subsequent meeting shall be summoned by the official receiver by not less than seven days' notice, and shall not be held until after the public examination of the debtor is concluded. The notice shall state generally the terms of the proposal, and shall be accompanied by a report of the official receiver thereon.

(4) The debtor or the official receiver may, after the composition or scheme is accepted by the creditors, apply to the Court to approve it, and notice of the time appointed for hearing the application shall be given to each creditor who has proved.

(5) The Court shall, before approving a composition or scheme, hear a report of the official receiver as to the terms of the composition or scheme and as to the conduct of the debtor, and any objections which may be made by or on behalf of any creditor.

(6) If the Court is of opinion that the terms of the composition or scheme are not reasonable, or are not calculated to benefit the general body of creditors, or in any case in which the Court is required under this Act where the debtor is adjudged bankrupt to refuse his discharge, the Court shall, or if any such facts are proved as would under this Act justify the Court in refusing, qualifying, or suspending the debtor's discharge, the Court may, in its discretion, refuse to approve the composition or scheme.

(7) If the Court approves the composition or scheme, the approval may be testified by the seal of the Court being attached to the instrument containing the terms of the composition or scheme, or by the terms being embodied in an order of the Court.

(8) A composition or scheme accepted and approved in pursuance of this section shall be binding on all the creditors so far as relates to any debts due to them from the debtor and provable in bankruptcy.

(9) A certificate of the official receiver that a composition or scheme



has been duly accepted and approved shall, in the absence of fraud, be conclusive as to its validity. 46 & 47 Vict.  
c. 52.

(10) The provisions of a composition or scheme under this section may be enforced by the Court on application by any person interested, and any disobedience of an order of the Court made on the application shall be deemed a contempt of Court.

(11) If default is made in payment of any instalment due in pursuance of the composition or scheme, or if it appears to the Court, on satisfactory evidence, that the composition or scheme cannot in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, or that the approval of the Court was obtained by fraud, the Court may, if it thinks fit, on application by any creditor, adjudge the debtor bankrupt, and annul the composition or scheme, but without prejudice to the validity of any sale, disposition, or payment duly made, or thing duly done under or in pursuance of the composition or scheme. Where a debtor is adjudged bankrupt under this sub-section any debt provable in other respects, which has been contracted before the date of the adjudication, shall be provable in the bankruptcy.

(12) If, under or in pursuance of a composition or scheme, a trustee is appointed to administer the debtor's property or manage his business, Part V. of this Act shall apply to the trustee as if he were a trustee in a bankruptcy, and as if the terms "bankruptcy," "bankrupt," and "order of adjudication" included respectively a composition or scheme of arrangement, a compounding or arranging debtor, and order approving the composition or scheme.

(13) Part III. of this Act shall, so far as the nature of the case and the terms of the composition or scheme admit, apply thereto, the same interpretation being given to the words "trustee," "bankruptcy," "bankrupt," and "order of adjudication," as in the last preceding sub-section.

(14) No composition or scheme shall be approved by the Court which does not provide for the payment in priority to other debts of all debts directed to be so paid in the distribution of the property of a bankrupt.

(15) The acceptance by a creditor of a composition or scheme shall not release any person who under this Act would not be released by an order of discharge if the debtor had been adjudged bankrupt.

19.—Notwithstanding the acceptance and approval of a composition or scheme, such composition or scheme shall not be binding on any creditor so far as regards a debt or liability from which, under the provisions of this Act, the debtor would not be discharged by an order of discharge in bankruptcy, unless the creditor assents to the composition or scheme. Effect of  
composition  
or scheme.

#### *Adjudication of Bankruptcy.*

20.—(1) Where a receiving order is made against a debtor, then, if the creditors at the first meeting or any adjournment thereof by ordinary resolution resolve that the debtor be adjudged bankrupt, or pass no resolution, or if the creditors do not meet, or if a composition or scheme is not accepted or approved in pursuance of this Act within fourteen days after the conclusion of the examination of the debtor or such further time as the Court may allow, the Court shall adjudge the debtor bankrupt; and thereupon the property of the bankrupt shall become divisible among his creditors and shall vest in a trustee. Adjudica-  
tion of bank-  
ruptcy where  
composition  
not accepted  
or approved.

(2) Notice of every order adjudging a debtor bankrupt, stating the name, address, and description of the bankrupt, the date of the adjudication, and the Court by which the adjudication is made, shall be gazetted and advertised in a local paper in the prescribed manner, and the date of the order shall for the purposes of this Act be the date of the adjudication.

21.—(1) Where a debtor is adjudged bankrupt, or the creditors have Appoint-

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c. 52.

ment of  
trustee.

resolved that he be adjudged bankrupt, the creditors may, by ordinary resolution, appoint some fit person, whether a creditor or not, to fill the office of trustee of the property of the bankrupt; or they may resolve to leave his appointment to the committee of inspection hereinafter mentioned.

(2) The person so appointed shall give security in manner prescribed to the satisfaction of the Board of Trade, and the Board, if satisfied with the security, shall certify that his appointment has been duly made, unless they object to the appointment on the ground that it has not been made in good faith by a majority in value of the creditors voting, or that the person appointed is not fit to act as trustee, or that his connection with or relation to the bankrupt or his estate or any particular creditor makes it difficult for him to act with impartiality in the interests of the creditors generally.

(3) Provided that where the Board make any such objection they shall, if so requested by a majority in value of the creditors, notify the objection to the High Court, and thereupon the High Court may decide on its validity.

(4) The appointment of a trustee shall take effect as from the date of the certificate.

(5) The official receiver shall not, save as by this Act provided, be the trustee of the bankrupt's property.

(6) If a trustee is not appointed by the creditors within four weeks from the date of the adjudication, or, in the event of negotiations for a composition or scheme being pending at the expiration of those four weeks, then within seven days from the close of those negotiations by the refusal of the creditors to accept, or of the Court to approve, the composition or scheme, the official receiver shall report the matter to the Board of Trade, and thereupon the Board of Trade shall appoint some fit person to be trustee of the bankrupt's property, and shall certify the appointment.

(7) Provided that the creditors or the committee of inspection (if so authorized by resolution of the creditors) may, at any subsequent time, if they think fit, appoint a trustee, and on the appointment being made and certified the person appointed shall become trustee in the place of the person appointed by the Board of Trade.

(8) When a debtor is adjudged bankrupt after the first meeting of creditors has been held, and a trustee has not been appointed prior to the adjudication, the official receiver shall forthwith summon a meeting of creditors for the purpose of appointing a trustee.

Committee  
of in-  
spection.

22.—(1) The creditors, qualified to vote, may at their first or any subsequent meeting, by resolution, appoint from among the creditors qualified to vote, or the holders of general proxies or general powers of attorney from such creditors, a committee of inspection for the purpose of superintending the administration of the bankrupt's property by the trustee. The committee of inspection shall consist of not more than five nor less than three persons.

(2) The committee of inspection shall meet at such times as they shall from time to time appoint, and failing such appointment, at least once a month; and the trustee or any member of the committee may also call a meeting of the committee as and when he thinks necessary.

(3) The committee may act by a majority of their members present at a meeting, but shall not act unless a majority of the committee are present at the meeting.

(4) Any member of the committee may resign his office by notice in writing signed by him, and delivered to the trustee.

(5) If a member of the committee becomes bankrupt, or compounds or arranges with his creditors, or is absent from five consecutive meetings of the committee, his office shall thereupon become vacant.

(6) Any member of the committee may be removed by an ordinary



resolution at any meeting of creditors of which seven days' notice has been given, stating the object of the meeting. 46 & 47 VICT.  
C. 52.

(7) On a vacancy occurring in the office of a member of the committee, the trustee shall forthwith summon a meeting of creditors for the purpose of filling the vacancy, and the meeting may, by resolution, appoint another creditor or other person eligible as above to fill the vacancy.

(8) The continuing members of the committee, provided there be not less than two such continuing members, may act notwithstanding any vacancy in their body; and where the number of members of the committee of inspection is for the time being less than five, the creditors may increase that number so that it do not exceed five.

(9) If there be no committee of inspection, any act or thing or any direction or permission by this Act authorized or required to be done or given by the committee may be done or given by the Board of Trade on the application of the trustee.

23.—(1) Where a debtor is adjudged bankrupt the creditors may, if they think fit, at any time after the adjudication, by special resolution, resolve to entertain a proposal for a composition in satisfaction of the debts due to them under the bankruptcy, or for a scheme of arrangement of the bankrupt's affairs; and thereupon the same proceedings shall be taken and the same consequences shall ensue as in the case of a composition or scheme accepted before adjudication. Power to  
accept com-  
position or  
scheme after  
bankruptcy  
adjudica-  
tion.

(2) If the Court approves the composition or scheme it may make an order annulling the bankruptcy and vesting the property of the bankrupt in him or in such other person as the Court may appoint, on such terms, and subject to such conditions, if any, as the Court may declare.

(3) If default is made in payment of any instalment due in pursuance of the composition or scheme, or if it appears to the Court that the composition or scheme cannot proceed without injustice or undue delay, or that the approval of the Court was obtained by fraud, the Court may, if it thinks fit, on application by any person interested, adjudge the debtor bankrupt, and annul the composition or scheme, but without prejudice to the validity of any sale, disposition, or payment duly made, or thing duly done, under or in pursuance of the composition or scheme. Where a debtor is adjudged bankrupt under this sub-section, all debts, provable in other respects, which have been contracted before the date of such adjudication shall be provable in the bankruptcy.

*Control over Person and Property of Debtor.*

24.—(1) Every debtor against whom a receiving order is made shall, unless prevented by sickness or other sufficient cause, attend the first meeting of his creditors, and shall submit to such examination and give such information as the meeting may require. Duties of  
debtor as to  
discovery  
and realiza-  
tion of pro-  
perty.

(2) He shall give such inventory of his property, such list of his creditors and debtors, and of the debts due to and from them respectively, submit to such examination in respect of his property or his creditors, attend such other meetings of his creditors, wait at such times on the official receiver, special manager, or trustee, execute such powers of attorney, conveyances, deeds, and instruments, and generally do all such acts and things in relation to his property and the distribution of the proceeds amongst his creditors, as may be reasonably required by the official receiver, special manager, or trustee, or may be prescribed by general rules, or be directed by the Court by any special order or orders made in reference to any particular case, or made on the occasion of any special application by the official receiver, special manager, trustee, or any creditor or person interested.

(3) He shall, if adjudged bankrupt, aid, to the utmost of his power, in the realization of his property and the distribution of the proceeds among his creditors.

(4) If a debtor wilfully fails to perform the duties imposed on him by

46 & 47 Vict.  
c. 52.

this section, or to deliver up possession of any part of his property, which is divisible amongst his creditors under this Act, and which is for the time being in his possession or under his control, to the official receiver or to the trustee, or to any person authorized by the Court to take possession of it, he shall, in addition to any other punishment to which he may be subject, be guilty of a contempt of Court, and may be punished accordingly.

Arrest of  
debtor under  
certain cir-  
cumstances.

25.—(1) The Court may, by warrant addressed to any constable or prescribed officer of the Court, cause a debtor to be arrested, and any books, papers, money, and goods in his possession to be seized, and him and them to be safely kept as prescribed until such time as the Court may order under the following circumstances :

- (a) If after a bankruptcy notice has been issued under this Act, or after presentation of a bankruptcy petition by or against him, it appears to the Court that there is probable reason for believing that he is about to abscond with a view of avoiding payment of the debt in respect of which the bankruptcy notice was issued, or of avoiding service of a bankruptcy petition, or of avoiding appearance to any such petition, or of avoiding examination in respect of his affairs, or of otherwise avoiding, delaying, or embarrassing proceedings in bankruptcy against him.
- (b) If, after presentation of a bankruptcy petition by or against him, it appears to the Court that there is probable cause for believing that he is about to remove his goods with a view of preventing or delaying possession being taken of them by the official receiver or trustee, or that there is probable ground for believing that he has concealed or is about to conceal or destroy any of his goods, or any books, documents, or writings, which might be of use to his creditors in the course of his bankruptcy.
- (c) If, after service of a bankruptcy petition on him, or after a receiving order is made against him, he removes any goods in his possession above the value of five pounds, without the leave of the official receiver or trustee.
- (d) If, without good cause shown, he fails to attend any examination ordered by the Court.

Provided that no arrest upon a bankruptcy notice shall be valid and protected unless the debtor before or at the time of his arrest shall be served with such bankruptcy notice.

(2) No payment or composition made or security given after arrest made under this section shall be exempt from the provisions of this Act relating to fraudulent preferences.

Re-direction  
of debtor's  
letters.

26.—Where a receiving order is made against a debtor, the Court, on the application of the official receiver or trustee, may from time to time order that for such time, not exceeding three months, as the Court thinks fit, post letters addressed to the debtor at any place, or places, mentioned in the order for re-direction shall be re-directed, sent or delivered by the Postmaster-General, or the officers acting under him, to the official receiver, or the trustee, or otherwise as the Court directs, and the same shall be done accordingly.

Discovery of  
debtor's  
property.

27.—(1) The Court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the Court may deem capable of giving information respecting the debtor, his dealings or property, and the Court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings or property.

(2) If any person so summoned, after having been tendered a reasonable sum, refuses to come before the Court at the time appointed, or

refuses to produce any such document, having no lawful impediment made known to the Court at the time of its sitting and allowed by it, the Court may, by warrant, cause him to be apprehended and brought up for examination. 46 & 47 VICT. c. 52.

(3) The Court may examine on oath, either by word of mouth or by written interrogatories, any person so brought before it concerning the debtor, his dealings or property.

(4) If any person on examination before the Court admits that he is indebted to the debtor, the Court may, on the application of the official receiver or trustee, order him to pay to the receiver or trustee, at such time and in such manner as to the Court seems expedient, the amount admitted, or any part thereof, either in full discharge of the whole amount in question or not, as the Court thinks fit, with or without costs of the examination.

(5) If any person on examination before the Court admits that he has in his possession any property belonging to the debtor, the Court may, on the application of the official receiver or trustee, order him to deliver to the official receiver or trustee such property, or any part thereof, at such time, and in such manner, and on such terms as to the Court may seem just.

(6) The Court may, if it think fit, order that any person who if in England would be liable to be brought before it under this section shall be examined in Scotland or Ireland, or in any other place out of England.

#### *Discharge of Bankrupt.*

28.—(1) A bankrupt may, at any time after being adjudged bankrupt, apply to the Court for an order of discharge, and the Court shall appoint a day for hearing the application, but the application shall not be heard until the public examination of the bankrupt is concluded. The application shall be heard in open Court. Discharge of bankrupt.

(2) On the hearing of the application the Court shall take into consideration a report of the official receiver as to the bankrupt's conduct and affairs, and may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property: Provided that the Court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanour under this Act, or Part II. of the Debtors Act, 1869, or any amendment thereof, and shall, on proof of any of the facts hereinafter mentioned, either refuse the order, or suspend the operation of the order for a specified time, or grant an order of discharge, subject to such conditions as aforesaid.

(3) The facts hereinbefore referred to are—

(a) That the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his bankruptcy:

(b) That the bankrupt has continued to trade after knowing himself to be insolvent:

(c) That the bankrupt has contracted any debt provable in the bankruptcy, without having at the time of contracting it any reasonable or probable ground of expectation (proof whereof shall lie on him) of being able to pay it:

(d) That the bankrupt has brought on his bankruptcy by rash and hazardous speculations or unjustifiable extravagance in living:

(e) That the bankrupt has put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against him:

46 & 47 VICT.  
c. 52.

(f) That the bankrupt has within three months preceding the date of the receiving order, when unable to pay his debts as they become due, given an undue preference to any of his creditors :

(g) That the bankrupt has on any previous occasion been adjudged bankrupt, or made a statutory composition or arrangement with his creditors :

(h) That the bankrupt has been guilty of any fraud or fraudulent breach of trust.

(4) For the purposes of this section the report of the official receiver shall be *prima facie* evidence of the statements therein contained.

(5) Notice of the appointment by the Court of the day for hearing the application for discharge shall be published in the prescribed manner and sent fourteen days at least before the day so appointed to each creditor who has proved, and the Court may hear the official receiver and the trustee, and may also hear any creditor. At the hearing the Court may put such questions to the debtor and receive such evidence as it may think fit.

(6) The Court may, as one of the conditions referred to in this section, require the bankrupt to consent to judgment being entered against him by the official receiver or trustee for any balance of the debts provable under the bankruptcy which is not satisfied at the date of his discharge ; but in such case execution shall not be issued on the judgment without leave of the Court, which leave may be given on proof that the bankrupt has since his discharge acquired property or income available for payment of his debts.

(7) A discharged bankrupt shall, notwithstanding his discharge, give such assistance as the trustee may require in the realization and distribution of such of his property as is vested in the trustee, and if he fails to do so he shall be guilty of a contempt of Court ; and the Court may also, if it thinks fit, revoke his discharge, but without prejudice to the validity of any sale, disposition, or payment duly made or thing duly done subsequent to the discharge, but before its revocation.

Fraudulent  
settlements.

29.—In either of the following cases ; that is to say,

(1) In the case of a settlement made before and in consideration of marriage where the settlor is not at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement ; or

(2) In the case of any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest (not being money or property of or in right of his wife) ;

if the settlor is adjudged bankrupt or compounds or arranges with his creditors, and it appears to the Court that such settlement, covenant, or contract was made in order to defeat or delay creditors, or was unjustifiable having regard to the state of the settlor's affairs at the time when it was made, the Court may refuse or suspend an order of discharge, or grant an order subject to conditions, or refuse to approve a composition or arrangement, as the case may be, in like manner as in cases where the debtor has been guilty of fraud.

Effect of  
order of  
discharge.

30.—(1) An order of discharge shall not release the bankrupt from any debt on a recognizance nor from any debt with which the bankrupt may be chargeable at the suit of the Crown or of any person for any offence against a statute relating to any branch of the public revenue, or at the suit of the sheriff or other public officer on a bail bond entered into for the appearance of any person prosecuted for any such offence : and he shall not be discharged from such excepted debts unless the Treasury certify in writing their consent to his being discharged therefrom. An order of discharge shall not release the bankrupt from any debt or liability incurred by means of any fraud or fraudulent breach of trust to

which he was a party, nor from any debt or liability whereof he has obtained forbearance by any fraud to which he was a party. 46 & 47 VICT.  
C. 52.

(2) An order of discharge shall release the bankrupt from all other debts provable in bankruptcy.

(3) An order of discharge shall be conclusive evidence of the bankruptcy, and of the validity of the proceedings therein, and in any proceedings that may be instituted against a bankrupt who has obtained an order of discharge in respect of any debt from which he is released by the order, the bankrupt may plead that the cause of action occurred before his discharge, and may give this Act and the special matter in evidence.

(4) An order of discharge shall not release any person who at the date of the receiving order was a partner or co-trustee with the bankrupt or was jointly bound or had made any joint contract with him, or any person who was surety or in the nature of a surety for him.

31.—Where an undischarged bankrupt who has been adjudged bankrupt under this Act obtains credit to the extent of twenty pounds or upwards from any person without informing such person that he is an undischarged bankrupt, he shall be guilty of a misdemeanor, and may be dealt with and punished as if he had been guilty of a misdemeanor under the Debtors Act, 1869, and the provisions of that Act shall apply to proceedings under this section. Undis-  
charged  
bankrupt  
obtaining  
credit to ex-  
tent of 20l.  
to be guilty  
of misde-  
meanor.

## PART II.

### DISQUALIFICATIONS OF BANKRUPT.

32.—(1) Where a debtor is adjudged bankrupt he shall, subject to the provisions of this Act, be disqualified for— Disqualifica-  
tions of  
bankrupt.

(a) Sitting or voting in the House of Lords, or on any committee thereof, or being elected as a peer of Scotland or Ireland to sit and vote in the House of Lords;

(b) Being elected to, or sitting or voting in, the House of Commons, or on any committee thereof;

(c) Being appointed or acting as a justice of the peace;

(d) Being elected to or holding or exercising the office of mayor, alderman, or councillor;

(e) Being elected to or holding or exercising the office of guardian of the poor, overseer of the poor, member of a sanitary authority, or member of a school board, highway board, burial board, or select vestry.

(2) The disqualifications to which a bankrupt is subject under this section shall be removed and cease if and when,—

(a) The adjudication of bankruptcy against him is annulled; or

(b) He obtains from the Court his discharge with a certificate to the effect that his bankruptcy was caused by misfortune without any misconduct on his part.

The Court may grant or withhold such certificate as it thinks fit, but any refusal of such certificate shall be subject to appeal.

(3) The disqualifications imposed by this section shall extend to all parts of the United Kingdom.

33.—(1) If a member of the House of Commons is adjudged bankrupt, and the disqualifications arising therefrom under this Act are not removed within six months from the date of the order, the Court shall, immediately after the expiration of that time, certify the same to the Speaker of the House of Commons, and thereupon the seat of the member shall be vacant. Vacating of  
seat in House  
of Commons.

(2) Where the seat of a member so becomes vacant, the Speaker, during a recess of the House, whether by prorogation or by adjournment, shall forthwith, after receiving the certificate, cause notice thereof to be published in the London Gazette; and after the expiration of six days

46 & 47 VICT. after the publication shall (unless the House has met before that day, or  
c. 52. will meet on the day of the issue), issue his warrant to the clerk of the  
Crown to make out a new writ for electing another member in the room  
of the member whose seat has so become vacant.

(3) The powers of the Act of the twenty-fourth year of the reign of King George the Third, chapter twenty-six, "to repeal so much of two Acts made in the tenth and fifteenth years of the reign of His present Majesty as authorizes the Speaker of the House of Commons to issue his warrant to the clerk of the Crown for making out writs for the election of members to serve in Parliament in the manner therein mentioned; and for substituting other provisions for the like purposes," so far as those powers enable the Speaker to nominate and appoint other persons, being members of the House of Commons, to issue warrants for the making out of new writs during the vacancy of the office of Speaker or during his absence out of the realm, shall extend to enable him to make the like nomination and appointment for issuing warrants, under the like circumstances and conditions, for the election of a member in the room of any member whose seat becomes vacant under this Act.

Vacating of  
municipal  
and other  
offices.

34.—If a person is adjudged bankrupt whilst holding the office of mayor, alderman, councillor, guardian, overseer, or member of a sanitary authority, school board, highway board, burial board, or select vestry, his office shall thereupon become vacant.

Power for  
Court to  
annul adju-  
dication in  
certain cases

35.—(1) Where in the opinion of the Court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the Court that the debts of the bankrupt are paid in full, the Court may, on the application of any person interested, by order, annul the adjudication.

(2) Where an adjudication is annulled under this section all sales and dispositions of property and payments duly made, and all acts theretofore done, by the official receiver, trustee, or other person acting under their authority, or by the Court, shall be valid, but the property of the debtor who was adjudged bankrupt shall vest in such person as the Court may appoint, or in default of any such appointment revert to the debtor for all his estate or interest therein on such terms and subject to such conditions, if any, as the Court may declare by order.

(3) Notice of the order annulling an adjudication shall be forthwith gazetted and published in a local paper.

Meaning of  
payment of  
debts in full.

36.—For the purposes of this Part of this Act, any debt disputed by a debtor shall be considered as paid in full, if the debtor enters into a bond, in such sum and with such sureties as the Court approves, to pay the amount to be recovered in any proceeding for the recovery of or concerning the debt, with costs, and any debt due to a creditor who cannot be found or cannot be identified shall be considered as paid in full if paid into Court.

### PART III.

#### ADMINISTRATION OF PROPERTY.

##### *Proof of Debts.*

Description  
of debts  
provable in  
bankruptcy.

37.—(1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust, shall not be provable in bankruptcy.

(2) A person having notice of any act of bankruptcy available against the debtor shall not prove under the order for any debt or liability contracted by the debtor subsequently to the date of his so having notice.

(3) Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy.



(4) An estimate shall be made by the trustee of the value of any debt or liability provable as aforesaid, which by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value. 46 & 47 VICT.  
C. 52.

(5) Any person aggrieved by any estimate made by the trustee as aforesaid may appeal to the Court.

(6) If, in the opinion of the Court, the value of the debt or liability is incapable of being fairly estimated, the Court may make an order to that effect, and thereupon the debt or liability shall, for the purposes of this Act, be deemed to be a debt not provable in bankruptcy.

(7) If, in the opinion of the Court, the value of the debt or liability is capable of being fairly estimated, the Court may direct the value to be assessed, before the Court itself without the intervention of a jury, and may give all necessary directions for this purpose, and the amount of the value when assessed shall be deemed to be a debt provable in bankruptcy.

(8) "Liability" shall for the purposes of this Act include any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether the breach does or does not occur, or is or is not likely to occur or capable of occurring before the discharge of the debtor, and generally it shall include any express or implied engagement, agreement, or undertaking, to pay, or capable of resulting in the payment of money, or money's worth, whether the payment is, as respects amount fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies; as to mode of valuation capable of being ascertained by fixed rules, or as matter of opinion.

38.—Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order shall be made under this Act, and any other person proving or claiming to prove a debt under such receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had at the time of giving credit to the debtor, notice of an act of bankruptcy committed by the debtor, and available against him. Mutual  
credit and  
set-off.

39.—With respect to the mode of proving debts, the right of proof by secured and other creditors, the admission and rejection of proofs, and the other matters referred to in the Second Schedule, the rules in that schedule shall be observed. Rules as to  
proof of  
debts.

40.—(1) In the distribution of the property of a bankrupt there shall be paid in priority to all other debts,— Priority  
of debts.

(a) All parochial or other local rates due from the bankrupt at the date of the receiving order, and having become due and payable within twelve months next before such time, and all assessed taxes, land tax, property or income tax, assessed on him up to the fifth day of April next before the date of the receiving order, and not exceeding in the whole one year's assessment;

(b) All wages or salary of any clerk or servant in respect of services rendered to the bankrupt during four months before the date of the receiving order, not exceeding fifty pounds; and

(c) All wages of any labourer or workman, not exceeding fifty pounds, whether payable for time or piece-work, in respect of services rendered to the bankrupt during four months before the date of the receiving order.

(2) The foregoing debts shall rank equally between themselves, and

46 & 47 Vict.  
c. 52.

shall be paid in full, unless the property of the bankrupt is insufficient to meet them, in which case they shall abate in equal proportions between themselves.

(3) In the case of partners the joint estate shall be applicable in the first instance in payment of their joint debts, and the separate estate of each partner shall be applicable in the first instance in payment of his separate debts. If there is a surplus of the separate estates it shall be dealt with as part of the joint estate. If there is a surplus of the joint estate it shall be dealt with as part of the respective separate estates in proportion to the right and interest of each partner in the joint estate.

(4) Subject to the provisions of this Act all debts proved in the bankruptcy shall be paid *pari passu*.

(5) If there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date of the receiving order at the rate of four pounds per centum per annum on all debts proved in the bankruptcy.

(6) Nothing in this section shall alter the effect of section five of the Act twenty-eight and twenty-nine Victoria, chapter eighty-six, "to amend the Law of Partnership," or shall prejudice the provisions of the Friendly Societies Act, 1875.

38 & 39 Vict.  
c. 60.

Preferential  
claim in case  
of appren-  
ticeship.

41.—(1) Where at the time of the presentation of the bankruptcy petition any person is apprenticed or is an articulated clerk to the bankrupt, the adjudication of bankruptcy shall, if either the bankrupt or apprentice or clerk gives notice in writing to the trustee to that effect, be a complete discharge of the indenture of apprenticeship or articles of agreement; and if any money has been paid by or on behalf of the apprentice or clerk to the bankrupt as a fee, the trustee may, on the application of the apprentice or clerk, or of some person on his behalf, pay such sum as the trustee, subject to an appeal to the Court, thinks reasonable, out of the bankrupt's property, to or for the use of the apprentice or clerk, regard being had to the amount paid by him or on his behalf, and to the time during which he served with the bankrupt under the indenture or articles before the commencement of the bankruptcy, and to the other circumstances of the case.

(2) Where it appears expedient to a trustee, he may, on the application of any apprentice or articulated clerk to the bankrupt, or any person acting on behalf of such apprentice or articulated clerk, instead of acting under the preceding provisions of this section, transfer the indenture of apprenticeship or articles of agreement to some other person.

Power to  
landlord to  
distrain for  
rent.

42.—(1) The landlord or other person to whom any rent is due from the bankrupt may at any time, either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt for the rent due to him from the bankrupt, with this limitation, that if such distress for rent be levied after the commencement of the bankruptcy it shall be available only for one year's rent accrued due prior to the date of the order of adjudication, but the landlord or other person to whom the rent may be due from the bankrupt may prove under the bankruptcy for the surplus due for which the distress may not have been available.

(2) For the purposes of this section the term "order of adjudication" shall be deemed to include an order for the administration of the estate of a debtor whose debts do not exceed fifty pounds, or of a deceased person who dies insolvent.

*Property available for Payment of Debts.*

Relation  
back of  
trustee's  
title.

43.—The bankruptcy of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him, or, if the bankrupt is proved to have committed more acts



of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition; but no bankruptcy petition, receiving order, or adjudication shall be rendered invalid by reason of any act of bankruptcy anterior to the debt of the petitioning creditor.

46 & 47 VICT.  
C. 52.

44.—The property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt, shall not comprise the following particulars:

Description  
of bank-  
rupt's pro-  
perty divisi-  
ble amongst  
creditors.

- (1) Property held by the bankrupt on trust for any other person:
- (2) The tools (if any) of his trade and the necessary wearing apparel and bedding of himself, his wife and children, to a value, inclusive of tools and apparel and bedding, not exceeding twenty pounds in the whole:

But it shall comprise the following particulars:

- (i.) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge; and,
- (ii.) The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice; and,
- (iii.) All goods being, at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of this section.

#### *Effect of Bankruptcy on antecedent Transactions.*

45.—(1) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor.

Restriction  
of rights of  
creditor  
under execu-  
tion or  
attachment.

(2) For the purposes of this Act, an execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver.

46.—(1) Where the goods of a debtor are taken in execution, and before the sale thereof notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods to the official receiver or trustee under the order, but the costs of the execution shall be a charge on the goods so delivered, and the official receiver or trustee may sell the goods or an adequate part thereof for the purpose of satisfying the charge.

Duties of  
sheriff as to  
goods taken  
in execution

(2) Where the goods of a debtor are sold under an execution in respect of a judgment for a sum exceeding twenty pounds, the sheriff shall deduct the costs of the execution from the proceeds of sale, and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and the debtor is adjudged bankrupt thereon or on any other

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c. 52.

petition of which the sheriff has notice, the sheriff shall pay the balance to the trustee in the bankruptcy, who shall be entitled to retain the same as against the execution creditor, but otherwise he shall deal with it as if no notice of the presentation of a bankruptcy petition had been served on him.

(3) An execution levied by seizure and sale on the goods of a debtor is not invalid by reason only of its being an act of bankruptcy, and a person who purchases the goods in good faith under a sale by the sheriff shall in all cases acquire a good title to them against the trustee in bankruptcy.

Avoidance  
of voluntary  
settlements.

47.—(1) Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof.

(2) Any covenant or contract made in consideration of marriage, for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in the bankruptcy.

(3) "Settlement" shall for the purposes of this section include any conveyance or transfer of property.

Avoidance  
of pre-  
ferences in  
certain cases.

48.—(1) Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors shall, if the person making, taking, paying, or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy.

(2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt.

Protection of  
bonâ fide  
transactions  
without  
notice.

49.—Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements and preferences, nothing in this Act shall invalidate, in the case of a bankruptcy—

(a) Any payment by the bankrupt to any of his creditors,

(b) Any payment or delivery to the bankrupt,

(c) Any conveyance or assignment by the bankrupt for valuable consideration,

(d) Any contract, dealing, or transaction by or with the bankrupt for valuable consideration,

Provided that both the following conditions are complied with, namely—

(1) The payment, delivery, conveyance, assignment, contract, dealing,

or transaction, as the case may be, takes place before the date of the receiving order; and 46 & 47 Vict.  
c. 52.

- (2) The person (other than the debtor) to, by, or with whom the payment, delivery, conveyance, assignment, contract, dealing, or transaction was made, executed, or entered into, has not at the time of the payment, delivery, conveyance, assignment, contract, dealing, or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time.

*Realization of Property.*

50.—(1) The trustee shall, as soon as may be, take possession of the deeds, books, and documents of the bankrupt, and all other parts of his property capable of manual delivery. Possession of  
property by  
trustee.

(2) The trustee shall, in relation to and for the purpose of acquiring or retaining possession of the property of the bankrupt, be in the same position as if he were a receiver of the property appointed by the High Court, and the Court may on his application, enforce such acquisition or retention accordingly.

(3) Where any part of the property of the bankrupt consists of stock, shares in ships, shares, or any other property transferable in the books of any company, office, or person, the trustee may exercise the right to transfer the property to the same extent as the bankrupt might have exercised it if he had not become bankrupt.

(4) Where any part of the property of the bankrupt is of copyhold or customary tenure, or is any like property passing by surrender and admittance or in any similar manner, the trustee shall not be compellable to be admitted to the property, but may deal with it in the same manner as if it had been capable of being and had been duly surrendered or otherwise conveyed to such uses as the trustee may appoint; and any appointee of the trustee shall be admitted to or otherwise invested with the property accordingly.

(5) Where any part of the property of the bankrupt consists of things in action, such things shall be deemed to have been duly assigned to the trustee.

(6) Any treasurer or other officer, or any banker, attorney, or agent of a bankrupt, shall pay and deliver to the trustee all money and securities in his possession or power, as such officer, banker, attorney, or agent, which he is not by law entitled to retain as against the bankrupt or the trustee. If he does not he shall be guilty of a contempt of Court, and may be punished accordingly on the application of the trustee.

51.—Any person acting under warrant of the Court may seize any part of the property of a bankrupt in the custody or possession of the bankrupt, or of any other person, and with a view to such seizure may break open any house, building, or room of the bankrupt where the bankrupt is supposed to be, or any building or receptacle of the bankrupt where any of his property is supposed to be; and where the Court is satisfied that there is reason to believe that property of the bankrupt is concealed in a house or place not belonging to him, the Court may, if it thinks fit, grant a search warrant to any constable or officer of the Court, who may execute it according to its tenour. Seizure of  
property of  
bankrupt.

52.—(1) Where a bankrupt is a beneficed clergyman, the trustee may apply for a sequestration of the profits of the benefice, and the certificate of the appointment of the trustee shall be sufficient authority for the granting of sequestration without any writ or other proceeding, and the same shall accordingly be issued as on a writ of *levari facias* founded on a judgment against the bankrupt, and shall have priority over any other sequestration issued after the commencement of the bankruptcy in respect of a debt provable in the bankruptcy, except a sequestration issued before the date of the receiving order by or on behalf of a person who at the time of the issue thereof had not notice of an act Sequestra-  
tion of ec-  
clesiastical  
benefice.

46 & 47 Vict. of bankruptcy committed by the bankrupt, and available for grounding a  
c. 52. receiving order against him.

(2) The bishop of the diocese in which the benefice is situate may, if he thinks fit, appoint to the bankrupt such or the like stipend as he might by law have appointed to a curate duly licensed to serve the benefice in case the bankrupt had been non-resident, and the sequestrator shall pay the sum so appointed out of the profits of the benefice to the bankrupt, by quarterly instalments while he performs the duties of the benefice.

(3) The sequestrator shall also pay out of the profits of the benefice the salary payable to any duly licensed curate of the church of the benefice in respect of duties performed by him as such during four months before the date of the receiving order not exceeding fifty pounds.

84 & 85 Vict. (4) Nothing in this section shall prejudice the operation of the  
c. 43. Ecclesiastical Dilapidations Act, 1871, or the Sequestration Act, 1871, or  
34 & 35 Vict. any mortgage or charge duly created under any Act of Parliament before  
c. 45. the commencement of the bankruptcy on the profits of the benefice.

Appropriation of portion of pay or salary to creditors.

53.—(1) Where a bankrupt is an officer of the army or navy, or an officer or clerk or otherwise employed or engaged in the civil service of the Crown, the trustee shall receive for distribution amongst the creditors so much of the bankrupt's pay or salary as the Court, on the application of the trustee, with the consent of the chief officer of the department under which the pay or salary is enjoyed, may direct. Before making any order under this sub-section the Court shall communicate with the chief officer of the department as to the amount, time, and manner of the payment to the trustee, and shall obtain the written consent of the chief officer to the terms of such payment.

(2) Where a bankrupt is in the receipt of a salary or income other than as aforesaid, or is entitled to any half-pay, or pension, or to any compensation granted by the Treasury, the Court, on the application of the trustee, shall from time to time make such order as it thinks just for the payment of the salary, income, half-pay, pension, or compensation, or of any part thereof, to the trustee to be applied by him in such manner as the Court may direct.

(3) Nothing in this section shall take away or abridge any power of the chief officer of any public department to dismiss a bankrupt, or to declare the pension, half-pay, or compensation of any bankrupt to be forfeited.

Vesting and transfer of property.

54.—(1) Until a trustee is appointed the official receiver shall be the trustee for the purposes of this Act, and immediately on a debtor being adjudged bankrupt, the property of the bankrupt shall vest in the trustee.

(2) On the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed.

(3) The property of the bankrupt shall pass from trustee to trustee, including under that term the official receiver when he fills the office of trustee, and shall vest in the trustee for the time being during his continuance in office, without any conveyance, assignment, or transfer whatever.

(4) The certificate of appointment of a trustee shall, for all purposes of any law in force in any part of the British dominions requiring registration, enrolment, or recording of conveyances or assignments of property, be deemed to be a conveyance or assignment of property, and may be registered, enrolled, and recorded accordingly.

Disclaimer of onerous property.

55.—(1) Where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding that he has endeavoured to

sell or has taken possession of the property, or exercised any act of ownership in relation thereto, but subject to the provisions of this section, may, by writing signed by him, at any time within three months after the first appointment of a trustee, disclaim the property.

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Provided that where any such property shall not have come to the knowledge of the trustee within one month after such appointment, he may disclaim such property at any time within two months after he first became aware thereof.

(2) The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person.

(3) A trustee shall not be entitled to disclaim a lease without the leave of the Court, except in any cases which may be prescribed by general rules, and the Court may, before or on granting such leave, require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such orders with respect to fixtures, tenant's improvements, and other matters arising out of the tenancy as the Court thinks just.

(4) The trustee shall not be entitled to disclaim any property in pursuance of this section in any case where an application in writing has been made to the trustee by any person interested in the property requiring him to decide whether he will disclaim or not, and the trustee has for a period of twenty-eight days after the receipt of the application, or such extended period as may be allowed by the Court, declined or neglected to give notice whether he disclaims the property or not; and, in the case of a contract, if the trustee, after such application as aforesaid, does not within the said period or extended period disclaim the contract, he shall be deemed to have adopted it.

(5) The Court may, on the application of any person who is, as against the trustee, entitled to the benefit or subject to the burden of a contract made with the bankrupt, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise, as to the Court may seem equitable, and any damages payable under the order to any such person may be proved by him as a debt under the bankruptcy.

(6) The Court may, on application by any person either claiming any interest in any disclaimed property, or under any liability not discharged by this Act in respect of any disclaimed property, and on hearing such persons as it thinks fit, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Court thinks just; and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose.

Provided always, that where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the bankrupt, whether as under-lessee or as mortgagee by demise except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed, and any mortgagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and if there shall be no person claiming



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c. 52.

under the bankrupt who is willing to accept an order upon such terms, the Court shall have power to vest the bankrupt's estate and interest in the property in any person liable either personally or in a representative character, and either alone or jointly with the bankrupt to perform the lessee's covenants in such lease, freed and discharged from all estates, incumbrances, and interests created therein by the bankrupt.

(7) Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the bankrupt to the extent of the injury, and may accordingly prove the same as a debt under the bankruptcy.

Powers of  
trustee to  
deal with  
property.

56.—Subject to the provisions of this Act, the trustee may do all or any of the following things :

- (1) Sell all or any part of the property of the bankrupt (including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt), by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels :
- (2) Give receipts for any money received by him, which receipts shall effectually discharge the person paying the money from all responsibility in respect of the application thereof :
- (3) Prove, rank, claim, and draw a dividend in respect of any debt due to the bankrupt :
- (4) Exercise any powers the capacity to exercise which is vested in the trustee under this Act, and execute any powers of attorney, deeds, and other instruments for the purpose of carrying into effect the provisions of this Act :
- (5) Deal with any property to which the bankrupt is beneficially entitled as tenant in tail in the same manner as the bankrupt might have dealt with it ; and sections fifty-six to seventy-three (both inclusive) of the Act of the session of the third and fourth years of the reign of King William the Fourth (chapter seventy-four), "for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance," shall extend and apply to proceedings under this Act, as if those sections were here re-enacted and made applicable in terms to those proceedings.

Powers  
exercisable  
by trustee  
with per-  
mission of  
committee  
of in-  
spection.

57.—The trustee may, with the permission of the committee of inspection, do all or any of the following things :

- (1) Carry on the business of the bankrupt, so far as may be necessary for the beneficial winding up of the same :
- (2) Bring, institute, or defend any action or other legal proceeding relating to the property of the bankrupt :
- (3) Employ a solicitor or other agent to take any proceedings or do any business which may be sanctioned by the committee of inspection :
- (4) Accept as the consideration for the sale of any property of the bankrupt a sum of money payable at a future time subject to such stipulations as to security and otherwise as the committee think fit :
- (5) Mortgage or pledge any part of the property of the bankrupt for the purpose of raising money for the payment of his debts :
- (6) Refer any dispute to arbitration, compromise all debts, claims, and liabilities, whether present or future, certain or contingent, liquidated or unliquidated, subsisting or supposed to subsist between the bankrupt and any person who may have incurred any liability to the bankrupt, on the receipt of such sums, payable at such times, and generally on such terms as may be agreed on :
- (7) Make such compromise or other arrangement as may be thought expedient with creditors, or persons claiming to be creditors, in respect of any debts provable under the bankruptcy :
- (8) Make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to

the property of the bankrupt, made or capable of being made on the trustee by any person or by the trustee on any person : 46 & 47 VICT.  
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- (9) Divide in its existing form amongst the creditors, according to its estimated value, any property which from its peculiar nature or other special circumstances cannot be readily or advantageously sold.

The permission given for the purposes of this section shall not be a general permission to do all or any of the above-mentioned things, but shall only be a permission to do the particular thing or things for which permission is sought in the specified case or cases.

### *Distribution of Property.*

58.—(1) Subject to the retention of such sums as may be necessary for the costs of administration, or otherwise, the trustee shall, with all convenient speed, declare and distribute dividends amongst the creditors who have proved their debts. Declaration and distribution of dividends.

(2) The first dividend, if any, shall be declared and distributed within four months after the conclusion of the first meeting of creditors, unless the trustee satisfies the committee of inspection that there is sufficient reason for postponing the declaration to a later date.

(3) Subsequent dividends shall, in the absence of sufficient reason to the contrary, be declared and distributed at intervals of not more than six months.

(4) Before declaring a dividend the trustee shall cause notice of his intention to do so to be gazetted in the prescribed manner, and shall also send reasonable notice thereof to each creditor mentioned in the bankrupt's statement who has not proved his debt.

(5) When the trustee has declared a dividend he shall send to each creditor who has proved a notice showing the amount of the dividend and when and how it is payable, and a statement in the prescribed form as to the particulars of the estate.

59.—(1) Where one partner of a firm is adjudged bankrupt, a creditor to whom the bankrupt is indebted jointly with the other partners of the firm, or any of them, shall not receive any dividend out of the separate property of the bankrupt until all the separate creditors have received the full amount of their respective debts. Joint and separate dividends.

(2) Where joint and separate properties are being administered, dividends of the joint and separate properties shall, subject to any order to the contrary that may be made by the Court on the application of any person interested, be declared together; and the expenses of and incident to such dividends shall be fairly apportioned by the trustee between the joint and separate properties, regard being had to the work done for and the benefit received by each property.

60.—In the calculation and distribution of a dividend the trustee shall make provision for debts provable in bankruptcy appearing from the bankrupt's statements, or otherwise, to be due to persons resident in places so distant from the place where the trustee is acting that in the ordinary course of communication they have not had sufficient time to tender their proofs, or to establish them if disputed, and also for debts provable in bankruptcy, the subject of claims not yet determined. He shall also make provision for any disputed proofs or claims, and for the expenses necessary for the administration of the estate or otherwise, and, subject to the foregoing provisions, he shall distribute as dividend all money in hand. Provision for creditors residing at a distance, etc.

61.—Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled to be paid out of any money for the time being in the hands of the trustee any dividend or dividends he may have failed to receive before that money is applied to the payment of any future dividend or dividends, but he shall not be entitled Right of creditor who has not proved debt before declaration of a dividend.

46 & 47 VICT. c. 52. to disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein.

Final dividend.

62.—When the trustee has realized all the property of the bankrupt, or so much thereof as can, in the joint opinion of himself and of the committee of inspection, be realized without needlessly protracting the trusteeship, he shall declare a final dividend, but before so doing he shall give notice in manner prescribed to the persons whose claims to be creditors have been notified to him, but not established to his satisfaction, that if they do not establish their claims to the satisfaction of the Court within a time limited by the notice, he will proceed to make a final dividend, without regard to their claims. After the expiration of the time so limited, or, if the Court on application by any such claimant grant him further time for establishing his claim, then on the expiration of such further time, the property of the bankrupt shall be divided among the creditors who have proved their debts, without regard to the claims of any other persons.

No action for dividend.

63.—No action for a dividend shall lie against the trustee, but if the trustee refuses to pay any dividend the Court may, if it thinks fit, order him to pay it, and also to pay out of his own money interest thereon for the time that it is withheld, and the costs of the application.

Power to allow bankrupt to manage property.

64.—(1) The trustee, with the permission of the committee of inspection, may appoint the bankrupt himself to superintend the management of the property of the bankrupt or of any part thereof, or to carry on the trade (if any) of the bankrupt for the benefit of his creditors, and in any other respect to aid in administering the property in such manner and on such terms as the trustee may direct.

Allowance to bankrupt for maintenance or service.

(2) The trustee may from time to time, with the permission of the committee of inspection, make such allowance as he may think just to the bankrupt out of his property for the support of the bankrupt and his family, or in consideration of his services if he is engaged in winding up his estate, but any such allowance may be reduced by the Court.

Right of bankrupt to surplus.

65.—The bankrupt shall be entitled to any surplus remaining after payment in full of his creditors, with interest, as by this Act provided, and of the costs, charges, and expenses of the proceedings under the bankruptcy petition.

#### PART IV.

##### OFFICIAL RECEIVERS AND STAFF OF BOARD OF TRADE.

Appointment by Board of Trade of official receivers of debtors' estates.

66.—(1) The Board of Trade may, at any time after the passing of this Act, and from time to time, appoint such persons as they think fit to be official receivers of debtors' estates, and may remove any person so appointed from such office. The official receivers of debtors' estates shall act under the general authority and directions of the Board of Trade, but shall also be officers of the Courts to which they are respectively attached.

(2) The number of official receivers so to be appointed, and the districts to be assigned to them, shall be fixed by the Board of Trade, with the concurrence of the Treasury. One person only shall be appointed for each district unless the Board of Trade, with the concurrence of the Treasury, shall otherwise direct; but the same person may, with the like concurrence, be appointed to act for more than one district.

(3) Where more than one official receiver is attached to the Court, such one of them as is for the time being appointed by the Court for any particular estate shall be the official receiver for the purposes of that estate. The Court shall distribute the receiverships of the particular estates among the official receivers in the prescribed manner.

Deputy for official receiver.

67.—(1) The Board of Trade may from time to time, by order direct that any of its officers mentioned in the order shall be capable of dis-



charging the duties of any official receiver during any temporary vacancy in the office or during the temporary absence of any official receiver through illness or otherwise. 46 & 47 VICT.  
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(2) The Board of Trade may, on the application of an official receiver, at any time by order nominate some fit person to be his deputy, and to act for him for such time not exceeding two months as the order may fix, and under such conditions as to remuneration and otherwise as may be prescribed.

68.—(1) The duties of the official receiver shall have relation both to the conduct of the debtor and to the administration of his estate. Status of  
official  
receiver.

(2) An official receiver may, for the purpose of affidavits verifying proofs, petitions, or other proceedings under this Act, administer oaths.

(3) All expressions referring to the trustee under a bankruptcy shall, unless the context otherwise requires, or the Act otherwise provides, include the official receiver when acting as trustee.

(4) The trustee shall supply the official receiver with such information, and give him such access to, and facilities for inspecting the bankrupt's books and documents and generally shall give him such aid, as may be requisite for enabling the official receiver to perform his duties under this Act.

69.—As regards the debtor, it shall be the duty of the official receiver— Duties of  
official re-  
ceiver as  
regards the  
debtor's  
conduct.

(1) To investigate the conduct of the debtor and to report to the Court, stating whether there is reason to believe that the debtor has committed any act which constitutes a misdemeanour under the Debtors Act, 1869, or any amendment thereof, or under this Act, or which would justify the Court in refusing, suspending, or qualifying an order for his discharge.

(2) To make such other reports concerning the conduct of the debtor as the Board of Trade may direct.

(3) To take such part as may be directed by the Board of Trade in the public examination of the debtor.

(4) To take such part, and give such assistance, in relation to the prosecution of any fraudulent debtor as the Board of Trade may direct.

70.—(1) As regards the estate of a debtor it shall be the duty of the official receiver— Duties of  
official re-  
ceiver as  
to debtor's  
estate.

(a) Pending the appointment of a trustee, to act as interim receiver of the debtor's estate, and, where a special manager is not appointed, as manager thereof:

(b) To authorize the special manager to raise money or make advances for the purposes of the estate in any case where, in the interests of the creditors, it appears necessary so to do:

(c) To summon and preside at the first meeting of creditors:

(d) To issue forms of proxy for use at the meetings of creditors:

(e) To report to the creditors as to any proposal which the debtor may have made with respect to the mode of liquidating his affairs:

(f) To advertise the receiving order, the date of the creditors' first meeting and of the debtor's public examination, and such other matters as it may be necessary to advertise:

(g) To act as trustee during any vacancy in the office of trustee.

(2) For the purpose of his duties as interim receiver or manager the official receiver shall have the same powers as if he were a receiver and manager appointed by the High Court, but shall, as far as practicable, consult the wishes of the creditors with respect to the management of the debtor's property, and may for that purpose, if he thinks it advisable, summon meetings of the persons claiming to be creditors, and shall not, unless the Board of Trade otherwise order, incur any expense beyond such as is requisite for the protection of the debtor's property or the disposing of perishable goods.

Provided that when the debtor cannot himself prepare a proper state-

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ment of affairs, the official receiver may, subject to any prescribed conditions, and at the expense of the estate, employ some person or persons to assist in the preparation of the statement of affairs.

(3) Every official receiver shall account to the Board of Trade and pay over all moneys and deal with all securities in such manner as the Board from time to time direct.

Power for  
Board of  
Trade to  
appoint  
officers.

71. The Board of Trade may, at any time after the passing of this Act, and from time to time, with the approval of the Treasury, appoint such additional officers, including official receivers, clerks, and servants (if any) as may be required by the Board for the execution of this Act, and may dismiss any person so appointed.

## PART V.

### TRUSTEES IN BANKRUPTCY.

#### *Remuneration of Trustees.*

Remunera-  
tion of  
trustee.

72.—(1) Where the creditors appoint any person to be trustee of a debtor's estate, his remuneration (if any) shall be fixed by an ordinary resolution of the creditors, or if the creditors so resolve by the committee of inspection, and shall be in the nature of a commission or percentage, of which one part shall be payable on the amount realized, after deducting any sums paid to secured creditors out of the proceeds of their securities, and the other part on the amount distributed in dividend.

(2) If one-fourth in number or value of the creditors dissent from the resolution, or the bankrupt satisfies the Board of Trade that the remuneration is unnecessarily large, the Board of Trade shall fix the amount of the remuneration.

(3) The resolution shall express what expenses the remuneration is to cover, and no liability shall attach to the bankrupt's estate, or to the creditors, in respect of any expenses which the remuneration is expressed to cover.

(4) Where no remuneration has been voted to a trustee he shall be allowed out of the bankrupt's estate such proper costs and expenses incurred by him in or about the proceedings of the bankruptcy as the taxing officer may allow.

(5) A trustee shall not, under any circumstances whatever, make any arrangement for or accept from the bankrupt, or any solicitor, auctioneer, or any other person that may be employed about a bankruptcy, any gift, remuneration, or pecuniary or other consideration or benefit whatever beyond the remuneration fixed by the creditors and payable out of the estate, nor shall he make any arrangement for giving up, or give up, any part of his remuneration, either as receiver, manager, or trustee to the bankrupt, or any solicitor or other person that may be employed about a bankruptcy.

#### *Costs.*

Allowance  
and taxation  
of costs.

73.—(1) Where a trustee or manager receives remuneration for his services as such no payment shall be allowed in his accounts in respect of the performance by any other person of the ordinary duties which are required by statute or rules to be performed by himself.

(2) Where the trustee is a solicitor he may contract that the remuneration for his services as trustee shall include all professional services.

(3) All bills and charges of solicitors, managers, accountants, auctioneers, brokers, and other persons, not being trustees, shall be taxed by the prescribed officer, and no payments in respect thereof shall be allowed in the trustee's accounts without proof of such taxation having been made. The taxing master shall satisfy himself before passing such

bills and charges that the employment of such solicitors and other persons, in respect of the particular matters out of which such charges arise, has been duly sanctioned. 46 & 47 Vict.  
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(4) Every such person shall, on request by the trustee (which request the trustee shall make a sufficient time before declaring a dividend), deliver his bill of costs or charges to the proper officer for taxation, and if he fails to do so within seven days after receipt of the request, or such further time as the Court, on application, may grant, the trustee shall declare and distribute the dividend without regard to any claim by him, and thereupon any such claim shall be forfeited as well against the trustee personally as against the estate.

*Receipts, Payments, Accounts, Audit.*

74.—(1) An account called the Bankruptcy Estates Account shall be kept by the Board of Trade with the Bank of England, and all moneys received by the Board of Trade in respect of proceedings under this Act shall be paid to that account. Payment of  
money into  
Bank of  
England.

(2) The account of the Accountant in Bankruptcy at the Bank of England shall be transferred to the Bankruptcy Estates Account.

(3) Every trustee in bankruptcy shall, in such manner and at such times as the Board of Trade with the concurrence of the Treasury direct, pay the money received by him to the Bankruptcy Estates Account at the Bank of England, and the Board of Trade shall furnish him with a certificate of receipt of the money so paid.

(4) Provided that if it appears to the committee of inspection that for the purpose of carrying on the debtor's business, or of obtaining advances, or because of the probable amount of the cash balance, or if the committee shall satisfy the Board of Trade that for any other reason it is for the advantage of the creditors that the trustee should have an account with a local bank, the Board of Trade shall, on the application of the committee of inspection, authorize the trustee to make his payments into and out of such local bank as the committee may select.

Such account shall be opened and kept by the trustee in the name of the debtor's estate; and any interest receivable in respect of the account shall be part of the assets of the estate.

The trustee shall make his payments into and out of such local bank in the prescribed manner.

(5) Subject to any general rules relating to small bankruptcies under Part VII. of this Act, where the debtor at the date of the receiving order has an account at a bank, such account shall not be withdrawn until the expiration of seven days from the day appointed for the first meeting of creditors, unless the Board of Trade, for the safety of the account, or other sufficient cause, order the withdrawal of the account.

(6) If a trustee at any time retains for more than ten days a sum exceeding fifty pounds, or such other amount as the Board of Trade in any particular case authorize him to retain, then, unless he explains the retention to the satisfaction of the Board of Trade, he shall pay interest on the amount so retained in excess at the rate of twenty pounds per centum per annum, and shall have no claim for remuneration, and may be removed from his office by the Board of Trade, and shall be liable to pay any expenses occasioned by reason of his default.

(7) All payments out of money standing to the credit of the Board of Trade in the Bankruptcy Estates Account shall be made by the Bank of England in the prescribed manner.

75.—No trustee in a bankruptcy or under any composition or scheme of arrangement shall pay any sums received by him as trustee into his private banking account. Trustee not  
to pay into  
private  
account.

76.—(1) Whenever the cash balance standing to the credit of the Bankruptcy Estates Account is in excess of the amount which in the Investment

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of surplus  
funds.

opinion of the Board of Trade is required for the time being to answer demands in respect of bankrupts' estates, the Board of Trade shall notify the same to the Treasury, and shall pay over the same or any part thereof as the Treasury may require to the Treasury, to such account as the Treasury may direct, and the Treasury may invest the said sums or any other part thereof in Government securities to be placed to the credit of the said account.

(2) Whenever any part of the money so invested is, in the opinion of the Board of Trade, required to answer any demands in respect of bankrupts' estates, the Board of Trade shall notify to the Treasury the amount so required, and the Treasury shall thereupon repay to the Board of Trade such sum as may be required to the credit of the Bankruptcy Estates Account, and for that purpose may direct the sale of such part of the said securities as may be necessary.

(3) The dividends on the investments under this section shall be paid to such account as the Treasury may direct, and regard shall be had to the amount thus derived in fixing the fees payable in respect of bankruptcy proceedings.

Certain re-  
ceipts and  
fees to be  
applied in  
aid of expen-  
diture.

Audit of  
trustee's  
accounts.

77.—The Treasury may from time to time issue to the Board of Trade in aid of the votes of Parliament, out of the receipts arising from fees, fee stamps, and dividends on investments under this Act, any sums which may be necessary to meet the charges estimated by the Board of Trade in respect of salaries and expenses under this Act.

78.—(1) Every trustee shall, at such times as may be prescribed, but not less than twice in each year during his tenure of office, send to the Board of Trade, or as they direct, an account of his receipts and payments as such trustee.

(2) The account shall be in a prescribed form, shall be made in duplicate, and shall be verified by a statutory declaration in the prescribed form.

(3) The Board of Trade shall cause the accounts so sent to be audited, and for the purposes of the audit the trustee shall furnish the Board with such vouchers and information as the Board may require, and the Board may at any time require the production of and inspect any books or accounts kept by the trustee.

(4) When any such account has been audited one copy thereof shall be filed and kept by the Board, and the other copy shall be filed with the Court, and each copy shall be open to the inspection of any creditor, or of the bankrupt, or of any person interested.

The trustee  
to furnish  
list of  
creditors.

79.—The trustee shall, whenever required by any creditor so to do, and on payment by such creditor of the prescribed fee, furnish and transmit to such creditor by post a list of the creditors, showing in such list the amount of the debt due to each of such creditors.

Books to  
be kept by  
trustee.

80.—The trustee shall keep, in manner prescribed, proper books, in which he shall from time to time cause to be made entries or minutes of proceedings at meetings, and of such other matters as may be prescribed, and any creditor of the bankrupt may, subject to the control of the Court, personally or by his agent inspect any such books.

Annual  
statement of  
proceedings.

81.—(1) Every trustee in a bankruptcy shall from time to time, as may be prescribed, and not less than once in every year during the continuance of the bankruptcy, transmit to the Board of Trade a statement showing the proceedings in the bankruptcy up to the date of the statement, containing the prescribed particulars, and made out in the prescribed form.

(2) The Board of Trade shall cause the statements so transmitted to be examined, and shall call the trustee to account for any misfeasance, neglect, or omission which may appear on the said statements or in his accounts or otherwise, and may require the trustee to make good any loss which the estate of the bankrupt may have sustained by the misfeasance, neglect, or omission.

*Release of Trustee.*46 & 47 VICT.  
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82.—(1) When the trustee has realised all the property of the bankrupt, or so much thereof as can, in his opinion, be realised without needlessly protracting the trusteeship, and distributed a final dividend, if any, or has ceased to act by reason of a composition having been approved, or has resigned, or has been removed from his office, the Board of Trade shall, on his application, cause a report on his accounts to be prepared, and, on his complying with all the requirements of the Board, shall take into consideration the report, and any objection which may be urged by any creditor or person interested against the release of the trustee, and shall either grant or withhold the release accordingly, subject nevertheless to an appeal to the High Court.

Release of  
trustee.

(2) Where the release of a trustee is withheld the Court may, on the application of any creditor or person interested, make such order as it thinks just, charging the trustee with the consequences of any act or default he may have done or made contrary to his duty.

(3) An order of the Board releasing the trustee shall discharge him from all liability in respect of any act done or default made by him in the administration of the affairs of the bankrupt, or otherwise in relation to his conduct as trustee, but any such order may be revoked on proof that it was obtained by fraud or by suppression or concealment of any material fact.

(4) Where the trustee has not previously resigned or been removed, his release shall operate as a removal of him from his office, and thereupon the official receiver shall be the trustee.

*Official Name.*

83.—The trustee may sue and be sued by the official name of “the trustee of the property of a bankrupt,” inserting the name of the bankrupt, and by that name may in any part of the British dominions or elsewhere hold property of every description, make contracts, sue and be sued, enter into any engagements binding on himself and his successors in office, and do all other acts necessary or expedient to be done in the execution of his office.

Official name  
of trustee.*Appointment and Removal.*

84.—(1) The creditors may, if they think fit, appoint more persons than one to the office of trustee, and when more persons than one are appointed they shall declare whether any act required or authorized to be done by the trustee is to be done by all or any one or more of such persons, but all such persons are in this Act included under the term “trustee,” and shall be joint-tenants of the property of the bankrupt.

Power to  
appoint joint  
or successive  
trustees.

(2) The creditors may also appoint persons to act as trustees in succession in the event of one or more of the persons first named declining to accept the office of trustee, or failing to give security, or not being approved of by the Board of Trade.

85.—If a receiving order is made against a trustee he shall thereby vacate his office of trustee.

Office of  
trustee  
vacated by  
insolvency.

86.—(1) The creditors may, by ordinary resolution, at a meeting specially called for that purpose, of which seven days' notice has been given, remove a trustee appointed by them, and may at the same or any subsequent meeting appoint another person to fill the vacancy as hereinafter provided in case of a vacancy in the office of trustee.

Removal of  
trustee.

(2) If the Board of Trade are of opinion that a trustee appointed by the creditors is guilty of misconduct, or fails to perform his duties under this Act, the Board may remove him from his office, but if the creditors, by ordinary resolution, disapprove of his removal, he or they may appeal against it to the High Court.

87.—(1) If a vacancy occurs in the office of a trustee the creditors in Proceedings,

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In case of  
vacancy in  
office of  
trustee.

general meeting may appoint a person to fill the vacancy, and thereupon the same proceedings shall be taken as in the case of a first appointment.

(2) The official receiver shall, on the requisition of any creditor, summon a meeting for the purpose of filling any such vacancy.

(3) If the creditors do not within three weeks after the occurrence of a vacancy appoint a person to fill the vacancy, the official receiver shall report the matter to the Board of Trade, and the Board may appoint a trustee; but in such case the creditors or committee of inspection shall have the same power of appointing a trustee as in the case of a first appointment.

(4) During any vacancy in the office of trustee the official receiver shall act as trustee.

*Voting powers of Trustee.*

Limitation  
of voting  
powers of  
trustee.

88.—The vote of the trustee, or of his partner, clerk, solicitor, or solicitor's clerk, either as creditor or as proxy for a creditor, shall not be reckoned in the majority required for passing any resolution affecting the remuneration or conduct of the trustee.

*Control over Trustee.*

Discre-  
tionary  
powers of  
trustee and  
control  
thereof.

89.—(1) Subject to the provisions of this Act the trustee shall, in the administration of the property of the bankrupt and in the distribution thereof amongst his creditors, have regard to any directions that may be given by resolution of the creditors at any general meeting, or by the committee of inspection, and any direction so given by the creditors at any general meeting shall in case of conflict be deemed to override any directions given by the committee of inspection.

(2) The trustee may from time to time summon general meetings of the creditors for the purpose of ascertaining their wishes, and it shall be his duty to summon meetings at such times as the creditors, by resolution, either at the meeting appointing the trustee or otherwise may direct, or whenever requested in writing to do so by one fourth in value of the creditors.

(3) The trustee may apply to the Court in manner prescribed for directions in relation to any particular matter arising under the bankruptcy.

(4) Subject to the provisions of this Act the trustee shall use his own discretion in the management of the estate and its distribution among the creditors.

Appeal to  
Court  
against  
trustee.

90.—If the bankrupt or any of the creditors, or any other person, is aggrieved by any act or decision of the trustee, he may apply to the Court, and the Court may confirm, reverse, or modify the act or decision complained of, and make such order in the premises as it thinks just.

Control of  
Board of  
Trade over  
trustees.

91.—(1) The Board of Trade shall take cognizance of the conduct of trustees, and in the event of any trustee not faithfully performing his duties, and duly observing all the requirements imposed on him by statute, rules, or otherwise, with respect to the performance of his duties, or in the event of any complaint being made to the Board by any creditor in regard thereto, the Board shall inquire into the matter and take such action thereon as may be deemed expedient.

(2) The Board may at any time require any trustee to answer any inquiry made by them in relation to any bankruptcy in which the trustee is engaged, and may, if the Board think fit, apply to the Court to examine on oath the trustee or any other person concerning the bankruptcy.

(3) The Board may also direct a local investigation to be made of the books and vouchers of the trustee.



## PART VI.

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## CONSTITUTION, PROCEDURE, AND POWERS OF COURT.

*Jurisdiction.*

92.—(1) The Courts having jurisdiction in bankruptcy shall be the High Court and the county courts. Jurisdiction to be exercised by High Court and county courts.

(2) But the Lord Chancellor may from time to time, by order under his hand, exclude any county court from having jurisdiction in bankruptcy, and for the purposes of bankruptcy jurisdiction may attach its district or any part thereof to the High Court, or to any other county court or courts, and may from time to time revoke or vary any order so made. The Lord Chancellor may, in like manner and subject to the like conditions, detach the district of any county court or any part thereof from the district and jurisdiction of the High Court.

(3) The term “district,” when used in this Act with reference to a county court, means the district of the court for the purposes of bankruptcy jurisdiction.

(4) A county court which, at the commencement of this Act, is excluded from having bankruptcy jurisdiction, shall continue to be so excluded until the Lord Chancellor otherwise orders.

(5) Periodical sittings for the transaction of bankruptcy business by county courts having jurisdiction in bankruptcy shall be holden at such times and at such intervals as the Lord Chancellor shall prescribe for each such court.

93.—(1) From and after the commencement of this Act the London Bankruptcy Court shall be united and consolidated with and form part of the Supreme Court of Judicature, and the jurisdiction of the London Bankruptcy Court shall be transferred to the High Court. Consolidation of London Bankruptcy Court with Supreme Court of Judicature.

(2) For the purposes of this union, consolidation, and transfer, and of all matters incidental thereto and consequential thereon, the Supreme Court of Judicature Act, 1873, as amended by subsequent Acts, shall, subject to the provisions of this Act, have effect as if the union, consolidation, and transfer had been effected by that Act, except that all expressions referring to the time appointed for the commencement of that Act shall be construed as referring to the commencement of this Act, and, subject as aforesaid, this Act and the said above-mentioned Acts shall be read and construed together.

94.—(1) Subject to general rules, and to orders of transfer made under the authority of the Supreme Court of Judicature Act, 1873, and Acts amending it,— Transaction of bankruptcy business by special judge of High Court.

(a) All matters pending in the London Bankruptcy Court at the commencement of this Act; and

(b) All matters which would have been within the exclusive jurisdiction of the London Bankruptcy Court, if this Act had not passed; and

(c) All matters in respect of which jurisdiction is given to the High Court by this Act,

shall be assigned to such Division of the High Court as the Lord Chancellor may from time to time direct.

(2) All such matters shall, subject as aforesaid, be ordinarily transacted and disposed of by or under the direction of one of the judges of the High Court, and the Lord Chancellor shall from time to time assign a judge for that purpose.

(3) Provided that during vacation, or during the illness of the judge so assigned, or during his absence or for any other reasonable cause such matters, or any part thereof, may be transacted and disposed of by or under the directions of any judge of the High Court named for that purpose by the Lord Chancellor.

(4) Subject to the provisions of this Act, the officers, clerks, and subordinate persons who are, at the commencement of this Act, attached to

46 & 47 VICT. c. 52. the London Bankruptcy Court, and their successors, shall be officers of the Supreme Court of Judicature, and shall be attached to the High Court.

(5) Subject to general rules, all bankruptcy matters shall be entitled, "In bankruptcy."

Petition,  
where to be  
presented.

95.—(1) If the debtor against or by whom a bankruptcy petition is presented has resided or carried on business within the London bankruptcy district as defined by this Act for the greater part of the six months immediately preceding the presentation of the petition, or for a longer period during those six months than in the district of any county court, or is not resident in England, or if the petitioning creditor is unable to ascertain the residence of the debtor, the petition shall be presented to the High Court.

(2) In any other case the petition shall be presented to the county court for the district in which the debtor has resided or carried on business for the longest period during the six months immediately preceding the presentation of the petition.

(3) Nothing in this section shall invalidate a proceeding by reason of its being taken in a wrong court.

Definition of  
the London  
Bankruptcy  
District.

96.—The London Bankruptcy District shall, for the purposes of this Act, comprise the city of London and the liberties thereof, and all such parts of the metropolis and other places as are situated within the district of any county court described as a metropolitan county court in the list contained in the Third Schedule.

Transfer  
of proceed-  
ings from  
court to  
court.

97.—(1) Subject to the provisions of this Act, every court having original jurisdiction in bankruptcy shall have jurisdiction throughout England.

(2) Any proceedings in bankruptcy may at any time, and at any stage thereof, and either with or without application from any of the parties thereto, be transferred by any prescribed authority and in the prescribed manner from one court to another court, or may by the like authority be retained in the court in which the proceedings were commenced, although it may not be the court in which the proceedings ought to have been commenced.

(3) If any question of law arises in any bankruptcy proceeding in a county court which all the parties to the proceeding desire, or which one of them and the judge of the county court may desire, to have determined in the first instance in the High Court, the judge shall state the facts, in the form of a special case, for the opinion of the High Court. The special case and the proceedings, or such of them as may be required, shall be transmitted to the High Court for the purposes of the determination.

Exercise in  
chambers of  
High Court  
jurisdiction.

98.—Subject to the provisions of this Act and to general rules the judge of the High Court exercising jurisdiction in bankruptcy may exercise in chambers the whole or any part of his jurisdiction.

Jurisdiction  
in bank-  
ruptcy of  
registrar.

99.—(1) The registrars in bankruptcy of the High Court, and the registrars of a county court having jurisdiction in bankruptcy, shall have the powers and jurisdiction in this section mentioned, and any order made or act done by such registrars in the exercise of the said powers and jurisdiction shall be deemed the order or act of the Court.

(2) Subject to general rules limiting the powers conferred by this section, a registrar shall have power—

(a) To hear bankruptcy petitions, and to make receiving orders and adjudications thereon:

(b) To hold the public examination of debtors:

(c) To grant orders of discharge where the application is not opposed:

(d) To approve compositions or schemes of arrangement when they are not opposed:



- (e) To make interim orders in any case of urgency :
- (f) To make any order or exercise any jurisdiction which by any rule in that behalf is prescribed as proper to be made or exercised in chambers :
- (g) To hear and determine any unopposed or ex parte application :
- (h) To summon and examine any person known or suspected to have in his possession effects of the debtor or to be indebted to him, or capable of giving information respecting the debtor, his dealings, or property.

46 & 47 VICT.  
c. 52.

(3) The registrars in bankruptcy of the High Court shall also have power to grant orders of discharge and certificates of removal of disqualifications, and to approve compositions and schemes of arrangement.

(4) A registrar shall not have power to commit for contempt of court.

(5) The Lord Chancellor may from time to time by order direct that any specified registrar of a county court shall have and exercise all the powers of a bankruptcy registrar of the High Court.

100.—A county court shall, for the purposes of its bankruptcy jurisdiction, in addition to the ordinary powers of the Court, have all the powers and jurisdiction of the High Court, and the orders of the Court may be enforced accordingly in manner prescribed.

Powers of  
county  
court.

101.—Where any moneys or funds have been received by an official receiver or by the Board of Trade, and the Court makes an order declaring that any person is entitled to such moneys or funds the Board of Trade shall make an order for the payment thereof to the person so entitled as aforesaid.

Board of  
Trade to  
make pay-  
ments in  
accordance  
with direc-  
tions of  
Court.

102.—(1) Subject to the provisions of this Act, every court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.

General  
power of  
bankruptcy  
courts.

Provided that the jurisdiction hereby given shall not be exercised by the county court for the purpose of adjudicating upon any claim, not arising out of the bankruptcy, which might heretofore have been enforced by action in the High Court, unless all parties to the proceeding consent thereto, or the money, money's worth, or right in dispute does not in the opinion of the judge exceed in value two hundred pounds.

(2) A court having jurisdiction in bankruptcy under this Act shall not be subject to be restrained in the execution of its powers under this Act by the order of any other court, nor shall any appeal lie from its decisions, except in manner directed by this Act.

(3) If in any proceeding in bankruptcy there arises any question of fact which either of the parties desire to be tried before a jury instead of by the Court itself, or which the Court thinks ought to be tried by a jury, the Court may if it thinks fit direct the trial to be had with a jury, and the trial may be had accordingly, in the High Court in the same manner as if it were the trial of an issue of fact in an action, and in the county court in the manner in which jury trials in ordinary cases are by law held in that court.

(4) Where a receiving order has been made in the High Court under this Act, the judge by whom such order was made shall have power, if he sees fit, without any further consent, to order the transfer to such judge of any action pending in any other division, brought or continued by or against the bankrupt.

(5) Where default is made by a trustee, debtor, or other person in obeying any order or direction given by the Board of Trade or by an official receiver or any other officer of the Board of Trade under any

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power conferred by this Act, the court may, on the application of the Board of Trade or an official receiver or other duly authorised person order such defaulting trustee, debtor, or person to comply with the order or direction so given; and the court may also, if it shall think fit, upon any such application make an immediate order for the committal of such defaulting trustee, debtor, or other person; provided that the power given by this sub-section shall be deemed to be in addition to and not in substitution for any other right or remedy in respect of such default.

*Judgment Debtors.*

Judgment  
debtor's  
summons to  
be bank-  
ruptcy  
business.

103.—(1) It shall be lawful for the Lord Chancellor by order to direct that the jurisdiction and powers under section five of the Debtors Act, 1869, now vested in the High Court, shall be assigned to and exercised by the judge to whom bankruptcy business is assigned.

(2) It shall be lawful also for the Lord Chancellor in like manner to direct that the whole or any part of the said jurisdiction and powers shall be delegated to and exercised by the bankruptcy registrars of the High Court.

(3) Any order made under this section may, at any time, in like manner, be rescinded or varied.

(4) Every county court within the jurisdiction of which a judgment debtor is or resides shall have jurisdiction under section five of the Debtors Act, 1869, although the amount of the judgment debt may exceed fifty pounds.

(5) Where, under section five of the Debtors Act, 1869, application is made by a judgment creditor to a court, having bankruptcy jurisdiction, for the committal of a judgment debtor, the court may, if it thinks fit, decline to commit, and in lieu thereof, with the consent of the judgment creditor, and on payment by him of the prescribed fee, make a receiving order against the debtor. In such case the judgment debtor shall be deemed to have committed an act of bankruptcy at the time the order is made.

(6) General rules under this Act may be made for the purpose of carrying into effect the provisions of the Debtors Act, 1869.

*Appeals.*

Appeals in  
bankruptcy.

104.—(1) Every court having jurisdiction in bankruptcy under this Act may review, rescind, or vary any order made by it under its bankruptcy jurisdiction.

(2) Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal as follows:

(a) An appeal shall lie from the order of a county court to Her Majesty's Court of Appeal:

(b) An appeal shall lie from the order of the High Court to Her Majesty's Court of Appeal:

(c) An appeal shall, with the leave of Her Majesty's Court of Appeal, but not otherwise, lie from the order of that Court to the House of Lords:

(d) No appeal shall be entertained except in conformity with such general rules as may for the time being be in force in relation to the appeal.

*Procedure.*

Discre-  
tionary  
powers of  
the Court.

105.—(1) Subject to the provisions of this Act and to general rules, the costs of and incidental to any proceeding in Court under this Act shall be in the discretion of the Court: Provided that where any issue is tried by a jury the costs shall follow the event, unless, upon application made at the trial, for good cause shown, the judge before whom such issue is tried shall otherwise order.

(2) The Court may at any time adjourn any proceedings before it upon such terms, if any, as it may think fit to impose.

(3) The Court may at any time amend any written process or proceeding under this Act upon such terms, if any, as it may think fit to impose. 46 & 47 VICT. C. 52.

(4) Where by this Act or by general rules, the time for doing any act or thing is limited, the Court may extend the time either before or after the expiration thereof, upon such terms, if any, as the Court may think fit to impose.

(5) Subject to general rules, the Court may in any matter take the whole or any part of the evidence either *vivâ voce*, or by interrogatories, or upon affidavit, or by commission abroad.

(6) For the purpose of approving a composition or scheme by joint debtors, the Court may, if it thinks fit, and on the report of the official receiver that it is expedient so to do, dispense with the public examination of one of such joint debtors if he is unavoidably prevented from attending the examination by illness or absence abroad.

106.—Where two or more bankruptcy petitions are presented against the same debtor or against joint debtors, the Court may consolidate the proceedings, or any of them, on such terms as the Court thinks fit. Consolidation of petitions.

107.—Where the petitioner does not proceed with due diligence on his petition, the Court may substitute as petitioner any other creditor to whom the debtor may be indebted in the amount required by this Act in the case of the petitioning creditor. Power to change carriage of proceedings.

108.—If a debtor by or against whom a bankruptcy petition has been presented dies, the proceedings in the matter shall, unless the Court otherwise orders, be continued as if he were alive. Continuance of proceedings on death of debtor.

109.—The Court may at any time, for sufficient reason, make an order staying the proceedings under a bankruptcy petition, either altogether or for a limited time, on such terms and subject to such conditions as the Court may think just. Power to stay proceedings.

110.—Any creditor whose debt is sufficient to entitle him to present a bankruptcy petition against all the partners of a firm may present a petition against any one or more partners of the firm without including the others. Power to present petition against one partner.

111.—Where there are more respondents than one to a petition the Court may dismiss the petition as to one or more of them, without prejudice to the effect of the petition as against the other or others of them. Power to dismiss petition against some respondents only.

112.—Where a receiving order has been made on a bankruptcy petition against or by one member of a partnership, any other bankruptcy petition against or by a member of the same partnership shall be filed in or transferred to the Court in which the first-mentioned petition is in course of prosecution, and, unless the Court otherwise directs, the same trustee or receiver shall be appointed as may have been appointed in respect of the property of the first-mentioned member of the partnership, and the Court may give such directions for consolidating the proceedings under the petitions as it thinks just. Property of partners to be vested in same trustee.

113.—Where a member of a partnership is adjudged bankrupt, the Court may authorise the trustee to commence and prosecute any action in the names of the trustee and of the bankrupt's partner; and any release by such partner of the debt or demand to which the action relates shall be void; but notice of the application for authority to commence the action shall be given to him, and he may show cause against it, and on his application the Court may, if it thinks fit, direct that he shall receive his proper share of the proceeds of the action, and if he does not claim any benefit therefrom he shall be indemnified against costs in respect thereof as the Court directs. Actions by trustee and bankrupt's partners.

114.—Where a bankrupt is a contractor in respect of any contract jointly with any person or persons, such person or persons may sue or be sued in respect of the contract without the joinder of the bankrupt. Actions on joint contracts.

115.—Any two or more persons, being partners, or any person carrying on business under a partnership name, may take proceedings or be proceeded against under this Act in the name of the firm, but in such case he Proceedings in partnership name.

46 & 47 Vict. c. 52. Court may, on application by any person interested, order the names of the persons who are partners in such firm or the name of such person to be disclosed in such manner, and verified on oath, or otherwise as the Court may direct.

### *Officers.*

Disabilities of officers.

116.—(1) No registrar or other officer attached to any court having jurisdiction in bankruptcy shall, during his continuance in office, be capable of being elected or sitting as a member of the House of Commons.

(2) No registrar or official receiver or other officer attached to any such court shall, during his continuance in office, either directly or indirectly, by himself, his clerk, or partner, act as solicitor in any proceeding in bankruptcy or in any prosecution of a debtor by order of the Court, and if he does so act he shall be liable to be dismissed from office.

Provided that nothing in this section shall affect the right of any registrar or officer appointed before the passing of this Act to act as solicitor by himself, his clerk, or partner to the extent permitted by section sixty-nine of the Bankruptcy Act, 1869.

### *Orders and Warrants of Court.*

Enforcement of orders of courts throughout the United Kingdom.

117.—Any order made by a court having jurisdiction in bankruptcy in England under this Act shall be enforced in Scotland and Ireland in the courts having jurisdiction in bankruptcy in those parts of the United Kingdom respectively, in the same manner in all respects as if the order had been made by the Court hereby required to enforce it; and in like manner any order made by a court having jurisdiction in bankruptcy in Scotland shall be enforced in England and Ireland, and any order made by a court having jurisdiction in bankruptcy in Ireland shall be enforced in England and Scotland by the courts respectively having jurisdiction in bankruptcy in the part of the United Kingdom where the orders may require to be enforced, and in the same manner in all respects as if the order had been made by the Court required to enforce it in a case of bankruptcy within its own jurisdiction.

Courts to be auxiliary to each other.

118.—The High Court, the county courts, the courts having jurisdiction in bankruptcy in Scotland and Ireland, and every British court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of those courts respectively, shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of the court seeking aid, with a request to another of the said courts, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court which made the request, or the court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions.

Warrants of Bankruptcy Courts.

119.—(1) Any warrant of a court having jurisdiction in bankruptcy in England may be enforced in Scotland, Ireland, the Isle of Man, the Channel Islands, and elsewhere in Her Majesty's dominions, in the same manner and subject to the same privileges in and subject to which a warrant issued by any justice of the peace against a person for an indictable offence against the laws of England may be executed in those parts of Her Majesty's dominions respectively in pursuance of the Acts of Parliament in that behalf.

(2) A search warrant issued by a court having jurisdiction in bankruptcy for the discovery of any property of a debtor may be executed in manner prescribed or in the same manner and subject to the same privileges in and subject to which a search warrant for property supposed to be stolen may be executed according to law.

Commitment to prison.

120.—Where the Court commits any person to prison, the commitment may be to such convenient prison as the Court thinks expedient, and if the gaoler of any prison refuses to receive any prisoner so committed he shall be liable for every such refusal to a fine not exceeding one hundred pounds.

## PART VII.

## SMALL BANKRUPTCIES.

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121.—When a petition is presented by or against a debtor, if the Court is satisfied by affidavit or otherwise, or the official receiver reports to the Court that the property of the debtor is not likely to exceed in value three hundred pounds, the Court may make an order that the debtor's estate be administered in a summary manner, and thereupon the provisions of this Act shall be subject to the following modifications:

Summary  
administra-  
tion in small  
cases.

- (1) If the debtor is adjudged bankrupt the official receiver shall be the trustee in the bankruptcy:
- (2) There shall be no committee of inspection, but the official receiver may do with the permission of the Board of Trade all things which may be done by the trustee with the permission of the committee of inspection:
- (3) Such other modifications may be made in the provisions of this Act as may be prescribed by general rules with the view of saving expense and simplifying procedure; but nothing in this section shall permit the modification of the provisions of this Act relating to the examination or discharge of the debtor.

Provided that the creditors may at any time, by special resolution, resolve that some person other than the official receiver be appointed trustee in the bankruptcy, and thereupon the bankruptcy shall proceed as if an order for summary administration had not been made.

122.—(1) Where a judgment has been obtained in a county court and the debtor is unable to pay the amount forthwith, and alleges that his whole indebtedness amounts to a sum not exceeding fifty pounds, inclusive of the debt for which the judgment is obtained, the county court may make an order providing for the administration of his estate, and for the payment of his debts by instalments or otherwise, and either in full or to such extent as to the county court under the circumstances of the case appears practicable, and subject to any conditions as to his future earnings or income which the Court may think just.

Power for  
county court  
to make  
administra-  
tion order  
instead of  
order for  
payment by  
instalments.

(2) The order shall not be invalid by reason only that the total amount of the debts is found at any time to exceed fifty pounds, but in such case the county court may, if it thinks fit, set aside the order.

(3) Where, in the opinion of the county court in which the judgment is obtained, it would be inconvenient that that court should administer the estate, it shall cause a certificate of the judgment to be forwarded to the county court in the district of which the debtor or the majority of the creditors resides or reside, and thereupon the latter county court shall have all the powers which it would have under this section, had the judgment been obtained in it.

(4) Where it appears to the registrar of the county court that property of the debtor exceeds in value ten pounds, he shall, at the request of any creditor, and without fee, issue execution against the debtor's goods, but the household goods, wearing apparel, and bedding of the debtor or his family, and the tools and implements of his trade to the value in the aggregate of twenty pounds, shall to that extent be protected from seizure.

(5) When the order is made no creditor shall have any remedy against the person or property of the debtor in respect of any debt which the debtor has notified to a county court, except with the leave of that county court, and on such terms as that court may impose; and any county court or inferior court in which proceedings are pending against the debtor in respect of any such debt shall, on receiving notice of the order, stay the proceedings, but may allow costs already incurred by the creditor, and such costs may, on application, be added to the debt notified.

(6) If the debtor makes default in payment of any instalment payable

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in pursuance of any order under this section, he shall, unless the contrary is proved, be deemed to have had since the date of the order the means to pay the sum in respect of which he has made default and to have refused or neglected to pay the same.

(7) The order shall be carried into effect in such manner as may be prescribed by general rules.

(8) Money paid into court under the order shall be appropriated first in satisfaction of the costs of the plaintiff in the action, next in satisfaction of the costs of administration (which shall not exceed two shillings in the pound on the total amount of the debts) and then in liquidation of debts in accordance with the order.

(9) Notice of the order shall be sent to the registrar of county court judgments, and be posted in the office of the county court of the district in which the debtor resides, and sent to every creditor notified by the debtor, or who has proved.

(10) Any creditor of the debtor, on proof of his debt before the registrar, shall be entitled to be scheduled as a creditor of the debtor for the amount of his proof.

(11) Any creditor may in the prescribed manner object to any debt scheduled, or to the manner in which payment is directed to be made by instalments.

(12) Any person who after the date of the order becomes a creditor of the debtor, shall, on proof of his debt before the registrar, be scheduled as a creditor of the debtor for the amount of his proof, but shall not be entitled to any dividend under the order until those creditors who are scheduled as having been creditors before the date of the order have been paid to the extent provided by the order.

(13) When the amount received under the order is sufficient to pay each creditor scheduled to the extent thereby provided, and the costs of the plaintiff and of the administration, the order shall be superseded, and the debtor shall be discharged from his debts to the scheduled creditors.

(14) In computing the salary of a registrar under the County Courts Acts every creditor scheduled, not being a judgment creditor, shall count as a plaintiff.

## PART VIII.

### SUPPLEMENTAL PROVISIONS.

#### *Application of Act.*

Exclusion of  
partnerships  
and com-  
panies.

123.—A receiving order shall not be made against any corporation, or against any partnership or association, or company registered under the Companies Act, 1862.

Privilege of  
Parliament.

124.—If a person having privilege of Parliament commits an act of bankruptcy, he may be dealt with under this Act in like manner as if he had not such privilege.

Administra-  
tion in bank-  
ruptcy of  
estate of  
person dying  
insolvent.

125.—(1) Any creditor of a deceased debtor whose debt would have been sufficient to support a bankruptcy petition against such debtor, had he been alive, may present to the court a petition in the prescribed form praying for an order for the administration of the estate of the deceased debtor, according to the Law of Bankruptcy.

(2) Upon the prescribed notice being given to the legal personal representative of the deceased debtor, the court may, in the prescribed manner, upon proof of the petitioner's debt, unless the court is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts owing by the deceased, make an order for the administration in bankruptcy of the deceased debtor's estate, or may upon cause shown dismiss such petition with or without costs.

(3) An order of administration under this section shall not be made



until the expiration of two months from the date of the grant of probate or letters of administration, unless with the concurrence of the legal personal representative of the deceased debtor, or unless the petitioner proves to the satisfaction of the court that the debtor committed an act of bankruptcy within three months prior to his decease.

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(4) A petition for administration under this section shall not be presented to the court after proceedings have been commenced in any court of justice for the administration of the deceased debtor's estate, but that court may in such case, on the application of any creditor, and on proof that the estate is insufficient to pay its debts, transfer the proceedings to the court exercising jurisdiction in bankruptcy, and thereupon such last-mentioned court may, in the prescribed manner, make an order for the administration of the estate of the deceased debtor, and the like consequences shall ensue as under an administration order made on the petition of a creditor.

(5) Upon an order being made for the administration of a deceased debtor's estate, the property of the debtor shall vest in the official receiver of the court, as trustee thereof, and he shall forthwith proceed to realize and distribute the same in accordance with the provisions of this Act.

(6) With the modifications hereinafter mentioned, all the provisions of Part III. of this Act, relating to the administration of the property of a bankrupt, shall, so far as the same are applicable, apply to the case of an administration order under this section in like manner as to an order of adjudication under this Act.

(7) In the administration of the property of the deceased debtor under an order of administration, the official receiver shall have regard to any claim by the legal personal representative of the deceased debtor to payment of the proper funeral and testamentary expenses incurred by him in and about the debtor's estate, and such claims shall be deemed a preferential debt under the order, and be payable in full, out of the debtor's estate, in priority to all other debts.

(8) If, on the administration of a deceased debtor's estate, any surplus remains in the hands of the official receiver, after payment in full of all the debts due from the debtor, together with the costs of the administration and interest as provided by this Act in case of bankruptcy, such surplus shall be paid over to the legal personal representative of the deceased debtor's estate, or dealt with in such other manner as may be prescribed.

(9) Notice to the legal personal representative of a deceased debtor of the presentation by a creditor of a petition under this section shall, in the event of an order for administration being made thereon, be deemed to be equivalent to notice of an act of bankruptcy, and after such notice no payment or transfer of property made by the legal personal representative shall operate as a discharge to him as between himself and the official receiver; save as aforesaid nothing in this section shall invalidate any payment made or any act or thing done in good faith by the legal personal representative before the date of the order for administration.

(10) Unless the context otherwise requires, "court," in this section, means the court within the jurisdiction of which the debtor resided or carried on business for the greater part of the six months immediately prior to his decease; "creditor" means one or more creditors qualified to present a bankruptcy petition, as in this Act provided.

(11) General rules, for carrying into effect the provisions of this section, may be made in the same manner and to the like effect and extent as in bankruptcy.

126.—No person, not being a trader within the meaning of the Bankruptcy Act, 1861, shall be adjudged bankrupt in respect of a debt contracted before the passing of that Act.

Saving as to  
debts con-  
tracted  
before Act

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*General Rules.*

of 1861.  
Power to  
make  
general  
rules.

127.—(1) The Lord Chancellor may from time to time, with the concurrence of the President of the Board of Trade, make, revoke, and alter general rules for carrying into effect the objects of this Act.

(2) All general rules made under the foregoing provisions of this section shall be laid before Parliament within three weeks after they are made if Parliament is then sitting, and if Parliament is not then sitting, within three weeks after the beginning of the then next session of Parliament, and shall be judicially noticed, and shall have effect as if enacted by this Act.

(3) Such general rules as may be required for purposes of this Act may be made at any time after the passing of this Act.

(4) Provided always, that the said general rules, so made, revoked, or altered, shall not extend the jurisdiction of the court.

(5) After the commencement of this Act no general rule under the provisions of this section shall come into operation until the expiration of one month after the same has been made and issued.

*Fees, Salaries, Expenditure, and Returns.*

Fees and  
remunera-  
tion.

128.—(1) The Lord Chancellor may, with the sanction of the Treasury, from time to time prescribe a scale of fees and percentages to be charged for or in respect of proceedings under this Act; and the Treasury shall direct by whom and in what manner the same are to be collected, accounted for, and to what account they shall be paid. The Board of Trade, with the concurrence of the Treasury, shall direct whether any and what remuneration is to be allowed to any officer of, or person attached to, the Board of Trade, performing any duties under this Act, and may from time to time vary, increase, or diminish such remuneration as they may see fit.

(2) This section shall come into operation on the passing of this Act.

Judicial  
salaries, etc.

129.—(1) The Lord Chancellor, with the concurrence of the Treasury, shall direct whether any and what remuneration is to be allowed to any person (other than an officer of the Board of Trade) performing any duties under this Act, and may from time to time vary, increase, or diminish such remuneration as he may think fit.

(2) This section shall come into operation on the passing of this Act.

Annual ac-  
counts of re-  
ceipts and  
expenditure  
in respect of  
bankruptcy  
proceedings.

130.—(1) The Treasury shall annually cause to be prepared and laid before both Houses of Parliament an account for the year ending with the thirty-first day of March, showing the receipts and expenditure during that year in respect of bankruptcy proceedings, whether commenced under this or any previous Act, and the provisions of section twenty-eight of the Supreme Court of Judicature Act, 1875, shall apply to the account as if the account had been required by that section.

(2) The accounts of the Board of Trade, under this Act, shall be audited in such manner as the Treasury from time to time direct, and, for the purpose of the account to be laid before Parliament, the Board of Trade shall make such returns, and give such information as the Treasury may from time to time direct.

Returns by  
bankruptcy  
officers.

131.—The registrars and other officers of the courts acting in bankruptcy shall make to the Board of Trade such returns of the business of their respective courts and offices, at such times and in such manner and form as may be prescribed, and from such returns the Board of Trade shall cause books to be prepared which shall, under the regulations of the Board, be open for public information and searches.

The Board of Trade shall also cause a general annual report of all matters, judicial and financial, within this Act, to be prepared and laid before both Houses of Parliament.



*Evidence.*

46 & 47 VICT.  
C. 52.

132.—(1) A copy of the London Gazette containing any notice inserted therein in pursuance of this Act shall be evidence of the facts stated in the notice.

Gazette to  
be evidence.

(2) The production of a copy of the London Gazette containing any notice of a receiving order, or of an order adjudging a debtor bankrupt, shall be conclusive evidence in all legal proceedings of the order having been duly made, and of its date.

133.—(1) A minute of proceedings at a meeting of creditors under this Act, signed at the same or the next ensuing meeting, by a person describing himself as, or appearing to be, chairman of the meeting at which the minute is signed, shall be received in evidence without further proof.

Evidence of  
proceedings  
at meetings  
of creditors.

(2) Until the contrary is proved, every meeting of creditors in respect of the proceedings whereof a minute has been so signed shall be deemed to have been duly convened and held, and all resolutions passed or proceedings had thereat to have been duly passed or had.

134.—Any petition or copy of a petition in bankruptcy, any order or certificate or copy of an order or certificate made by any Court having jurisdiction in bankruptcy, any instrument or copy of an instrument, affidavit, or document made or used in the course of any bankruptcy proceedings, or other proceedings had under this Act, shall, if it appears to be sealed with the seal of any Court having jurisdiction in bankruptcy, or purports to be signed by any judge thereof, or is certified as a true copy by any registrar thereof, be receivable in evidence in all legal proceedings whatever.

Evidence of  
proceedings  
in bank-  
ruptcy.

135.—Subject to general rules, any affidavit to be used in a bankruptcy court may be sworn before any person authorized to administer oaths in the High Court, or in the Court of Chancery of the county palatine of Lancaster, or before any registrar of a bankruptcy court, or before any officer of a bankruptcy court authorized in writing on that behalf by the judge of the Court, or, in the case of a person residing in Scotland or in Ireland, before a judge ordinary, magistrate, or justice of the peace, or, in the case of a person who is out of the Kingdom of Great Britain and Ireland, before a magistrate or justice of the peace or other person qualified to administer oaths in the country where he resides (he being certified to be a magistrate or justice of the peace, or qualified as aforesaid by a British minister or British consul, or by a notary public).

Swearing of  
affidavits.

136.—In case of the death of the debtor or his wife, or of a witness whose evidence has been received by any Court in any proceeding under this Act, the deposition of the person so deceased, purporting to be sealed with the seal of the Court, or a copy thereof, purporting to be so sealed, shall be admitted as evidence of the matters therein deposed to.

Death of  
witness.

137.—Every Court having jurisdiction in bankruptcy under this Act shall have a seal describing the Court in such manner as may be directed by order of the Lord Chancellor, and judicial notice shall be taken of the seal, and of the signature of the judge or registrar of any such Court, in all legal proceedings.

Bankruptcy  
Courts to  
have seals.

138.—A certificate of the Board of Trade that a person has been appointed trustee under this Act, shall be conclusive evidence of his appointment.

Certificate of  
appointment  
of trustee.

139.—Where by this Act an appeal to the High Court is given against any decision of the Board of Trade, or of the official receiver, the appeal shall be brought within twenty-one days from the time when the decision appealed against is pronounced or made.

Appeal from  
Board of  
Trade to  
High Court.

140.—(1) All documents purporting to be orders or certificates made or issued by the Board of Trade, and to be sealed with the seal of the

Proceedings  
of Board of  
Trade.

46 & 47 Vict.  
c. 52.

Board, or to be signed by a secretary or assistant secretary of the Board, or any person authorized in that behalf by the President of the Board, shall be received in evidence, and deemed to be such orders or certificates without further proof unless the contrary is shown.

(2) A certificate signed by the President of the Board of Trade that any order made, certificate issued, or act done, is the order, certificate, or act of the Board of Trade shall be conclusive evidence of the fact so certified.

#### *Time.*

Computa-  
tion of time.

141.—(1) Where by this Act any limited time from or after any date or event is appointed or allowed for the doing of any act or the taking of any proceedings, then in the computation of that limited time the same shall be taken as exclusive of the day of that date or of the happening of that event, and as commencing at the beginning of the next following day; and the act or proceeding shall be done or taken at latest on the last day of that limited time as so computed, unless the last day is a Sunday, Christmas Day, Good Friday, or Monday or Tuesday in Easter Week, or a day appointed for public fast, humiliation, or thanksgiving, or a day on which the Court does not sit, in which case any act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, which shall not be one of the days in this section specified.

(2) Where by this Act any act or proceeding is directed to be done or taken on a certain day, then if that day happens to be one of the days in this section specified, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, which shall not be one of the days in this section specified.

#### *Notices.*

Service of  
notices.

142.—All notices and other documents for the service of which no special mode is directed may be sent by prepaid post letter to the last known address of the person to be served therewith.

#### *Formal Defects.*

Formal  
defect not  
to invalidate  
proceedings.

143.—(1) No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that court.

(2) No defect or irregularity in the appointment or election of a receiver, trustee, or member of a committee of inspection shall vitiate any act done by him in good faith.

#### *Stamp Duty.*

Exemption  
of deeds, etc.,  
from stamp  
duty.

144.—Every deed, conveyance, assignment, surrender, admission, or other assurance relating solely to freehold, leasehold, copyhold, or customary property, or to any mortgage, charge, or other incumbrance on, or any estate, right, or interest in any real or personal property which is part of the estate of any bankrupt, and which, after the execution of the deed, conveyance, assignment, surrender, admission, or other assurance, either at law or in equity, is or remains the estate of the bankrupt or of the trustee under the bankruptcy, and every power of attorney, proxy paper, writ, order, certificate, affidavit, bond, or other instrument or writing relating solely to the property of any bankrupt, or to any proceeding under any bankruptcy, shall be exempt from stamp duty, except in respect of fees under this Act.

#### *Executions.*

Sales under  
executions to  
be public.

145.—Where the sheriff sells the goods of a debtor under an execution for a sum exceeding twenty pounds (including legal incidental expenses),

the sale shall, unless the court from which the process issued otherwise orders, be made by public auction, and not by bill of sale or private contract, and shall be publicly advertised by the sheriff on and during three days next preceding the day of sale. 46 & 47 Vict.  
c. 52.

146.—(1) The sheriff shall not under a writ of elegit deliver the goods of a debtor nor shall a writ of elegit extend to goods. Writ of elegit not to extend to goods.

(2) No writ of levam facias shall hereafter be issued in any civil proceeding.

#### *Bankrupt Trustee.*

147.—Where a bankrupt is a trustee within the Trustee Act, 1850, section thirty-two of that Act shall have effect so as to authorize the appointment of a new trustee in substitution for the bankrupt (whether voluntarily resigning or not), if it appears expedient to do so, and all provisions of that Act, and of any other Act relative thereto, shall have effect accordingly. Application of Trustee Act to bankruptcy of trustee.

#### *Corporations, etc.*

148.—For all or any of the purposes of this Act a corporation may act by any of its officers authorized in that behalf under the seal of the corporation, a firm may act by any of its members, and a lunatic may act by his committee or curator bonis. Acting of corporations, partners, etc.

#### *Construction of former Acts, etc.*

149.—(1) Where in any Act of Parliament, instrument, or proceeding passed, executed, or taken before the commencement of this Act mention is made of a commission of bankruptcy or fiat in bankruptcy, the same shall be construed, with reference to the proceedings under a bankruptcy petition, as if a commission of or a fiat in bankruptcy had been actually issued at the time of the presentation of such petition. Construction of Acts mentioning commission of bankruptcy, etc.

(2) Where by any Act or instrument, reference is made to the Bankruptcy Act, 1869, the Act or instrument shall be construed and have effect as if reference were made therein to the corresponding provisions of this Act.

150.—Save as herein provided the provisions of this Act relating to the remedies against the property of a debtor, the priorities of debts, the effect of a composition or scheme of arrangement, and the effect of a discharge shall bind the Crown. Certain provisions to bind the Crown.

151.—Nothing in this Act, or in any transfer of jurisdiction effected thereby shall take away or affect any right of audience that any person may have had at the commencement of this Act, and all solicitors or other persons who had the right of audience before the Chief Judge in Bankruptcy shall have the like right of audience in bankruptcy matters in the High Court. Saving for existing rights of audience.

152.—Nothing in this Act shall affect the provisions of the Married Women's Property Act, 1882. Married women.

#### *Transitory Provisions.*

153.—(1) The existing comptroller in bankruptcy and his officers, clerks, and servants shall not be attached to the Supreme Court, but shall in all respects act under the directions of the Board of Trade. Comptroller of bankruptcy, etc., and his staff.

(2) The existing official assignee, provisional and official assignee of the estates and effects of insolvent debtors, and receiver of the Insolvent Debtors' Court, together with his staff, the official solicitors and the messenger in bankruptcy, together with his staff, and the accountant in bankruptcy and his staff, and also such other officers and clerks of the London Bankruptcy Court as the Lord Chancellor, with the concurrence of the Board of Trade, may at any time select, shall be transferred to and become officers of the Board of Trade; provided that the Board of Trade, with the concurrence of the Lord Chancellor, may at any time transfer any such officer or clerk from the Board of Trade to the Supreme Court.

46 & 47 Vict.  
c. 52.

(8) Subject to the provisions of this Act they shall hold their offices by the same tenure and on the same terms and conditions, and be entitled to the same rights in respect of salary and pension as heretofore, and their duties shall, except so far as altered with their own consent, be such as in the opinion of the Board of Trade are analogous to those performed by them at the commencement of this Act.

(4) On the occurrence, at any time after the passing of this Act, of any vacancy in the office of any of the said persons the Board of Trade may, with the approval of the Treasury, make such arrangement as they think fit, either for the abolition of the office, or for its continuance under modified conditions, and may appoint a fit person to perform the remaining duties thereof, and the person so appointed shall have all the powers and authorities of the person who is at the passing of this Act the holder of such office; and all estates, rights, and effects vested at the time of the vacancy in any such officer shall by virtue of such appointment become vested in the person so appointed, and the like appointment on a vacancy shall be made, and the like vesting shall have effect from time to time as occasion requires: Provided that any person so appointed shall be an officer of the Board of Trade, and shall in all respects act under the directions of the Board of Trade.

(5) The Board of Trade may, with the approval of the Lord Chancellor, from time to time direct that any duties or functions, not of a judicial character, relating to any bankruptcies, insolvencies, or other proceedings under any Act prior to the Bankruptcy Act, 1869, which were, at the time of the passing of this Act, performed or exercised by registrars of county courts, shall devolve on and be performed by the official receiver, and thereupon all powers and authorities of the registrar, and all estates, rights, and effects vested in the registrar shall become vested in the official receiver.

Power to  
abolish  
existing  
offices.

154.—(1) If the Lord Chancellor is of opinion that any office attached to the London Bankruptcy Court at the passing of this Act is unnecessary, he may, with the concurrence of the Treasury, at any time after the passing of this Act, abolish the office.

(2) The Treasury may, on the petition of any person whose office or employment is abolished by or under this Act, on the commencement of this Act or on any other event, inquire whether any, and if any, what compensation ought to be made to the petitioner, regard being had to the conditions on which his appointment was made, the nature of his office or employment, and the duration of his service; and if they think that his claim to compensation is established, may award to him, out of moneys to be provided by Parliament, such compensation, by annuity or otherwise, as under the circumstances of the case they think just and reasonable.

(3) The Board of Trade may, under the like conditions and on the like terms, abolish any of the offices in the last preceding section mentioned.

Performance  
of new duties  
by persons  
whose offices  
are abo-  
lished.

155.—(1) The Lord Chancellor or Board of Trade may, at any time after the passing of this Act appoint any person whose office is abolished under this Act to some other office under this Act, the duties of which he is in the opinion of the Lord Chancellor or Board, competent to perform. Provided that the person so appointed shall during his tenure of the new office receive an amount of annual remuneration which, together with the compensation for the loss of the abolished office, is not less than the emoluments of the abolished office.

(2) When, after the commencement of this Act, any officer is continued in the performance of any duties relating to bankruptcy or insolvency, under any previous Act, the Lord Chancellor, or, as the case may be, the Board of Trade may order that such officer may, in addition to such duties, perform any analogous duties under this Act, without being entitled to receive any additional remuneration.

156.—Every person appointed to any office or employment under this Act shall in the first instance be selected from the persons (if any) whose office or employment is abolished under this Act, unless in the opinion of the Lord Chancellor, or in the case of persons to be appointed by the Board of Trade, of that Board, none of such persons are fit for such office or employment: Provided that the person so appointed or employed shall during his tenure of the new office be entitled to receive an amount of remuneration which, together with the compensation (if any) for loss of the abolished office, shall be not less than the emolument of the abolished office.

46 & 47 Vict.  
c. 52.

Selection of persons from holders of abolished offices.

157.—If any person to whom a compensation annuity is granted under this Act accepts any public employment, he shall, during the continuance of that employment, receive only so much (if any) of that annuity as, with the remuneration of that employment, will amount to a sum not exceeding the salary or emoluments in respect of the loss whereof the annuity was awarded, and if the remuneration of that employment is equal to or greater than such salary or emoluments the annuity shall be suspended so long as he receives that remuneration.

Acceptance of public employment by annuitants.

158.—The registrars, clerks, and other persons holding their offices at the passing of this Act who may be continued in their offices, shall, on their retirement therefrom, be allowed such superannuation as they would have been entitled to receive if this Act had not been passed, and they had continued in their offices under the existing Act.

Superannuation of registrars, etc.

159.—In every liquidation by arrangement under the Bankruptcy Act, 1869, pending at the commencement of this Act, if at any time after the commencement of this Act there is no trustee acting in the liquidation by reason of death, or for any other cause, such of the official receivers of bankrupts' estates as is appointed by the Board of Trade for that purpose shall become and be the trustee in the liquidation, and the property of the liquidating debtor shall pass to and vest in him accordingly; but this provision shall not prejudice the right of the creditors in the liquidation to appoint a new trustee, in manner directed by the Bankruptcy Act, 1869, or the rules thereunder; and on such appointment the property of the liquidating debtor shall pass to and vest in the new trustee.

Transfer of estates on vacancy of office of trustee in liquidation under the Bankruptcy Act, 1869.

The provisions of this Act with respect to the duties and responsibilities of and accounting by a trustee in a bankruptcy under this Act shall apply, as nearly as may be, to a trustee acting under the provisions of this section.

160.—Where a bankruptcy or liquidation by arrangement under the Bankruptcy Act, 1869, has been or is hereafter closed, any property of the bankrupt or liquidating debtor which vested in the trustee and has not been realized or distributed shall vest in such person as may be appointed by the Board of Trade for that purpose, and he shall thereupon proceed to get in, realize, and distribute the property in like manner and with and subject to the like powers and obligations as far as applicable, as if the bankruptcy or liquidation were continuing, and he were acting as trustee thereunder.

Transfer of outstanding property on close of bankruptcy or liquidation.

161.—In every bankruptcy under the Bankruptcy Act, 1869, pending at the commencement of this Act, where a registrar of the London Bankruptcy Court or of any county court is or would hereafter but for this enactment become the trustee under the bankruptcy, such of the official receivers of bankrupts' estates as may be appointed by the Board of Trade for that purpose shall from and after the commencement of this Act be the trustee in the place of the registrar, and the property of the bankrupt shall pass to and vest in the official receiver accordingly.

Transfer of estates from registrars of London Court to official receiver.

#### *Unclaimed Funds or Dividends.*

162.—(1) Where the trustee, under any bankruptcy, composition or scheme pursuant to this Act, shall have under his control any unclaimed

Unclaimed and undis-



46 & 47 Vict.  
c. 52.

tributed  
dividends or  
funds under  
this and  
former Acts.

dividend which has remained unclaimed for more than six months, or where, after making a final dividend, such trustee shall have in his hands or under his control any unclaimed or undistributed moneys arising from the property of the debtor, he shall forthwith pay the same to the Bankruptcy Estates Account at the Bank of England. The Board of Trade shall furnish him with a certificate of receipt of the money so paid, which shall be an effectual discharge to him in respect thereof.

(2) (a) Where, after the passing of this Act, any unclaimed or undistributed funds or dividends in the hands or under the control of any trustee or other person empowered to collect, receive, or distribute any funds or dividends under any Act of Parliament mentioned in the Fourth Schedule, or any petition, resolution, deed, or other proceeding under or in pursuance of any such Act, have remained or remain unclaimed or undistributed for six months after the same became claimable or distributable, or in any other case for two years after the receipt thereof by such trustee or other person, it shall be the duty of such trustee or other person forthwith to pay the same to the Bankruptcy Estates Account at the Bank of England. The Board of Trade shall furnish such trustee or other person with a certificate of receipt of the money so paid, which shall be an effectual discharge to him in respect thereof.

(b) The Board of Trade may at any time order any such trustee or other person to submit to them an account verified by affidavit of the sums received and paid by him under or in pursuance of any such petition, resolution, deed, or other proceeding as aforesaid, and may direct and enforce an audit of the account.

(c) The Board of Trade, with the concurrence of the Treasury, may from time to time appoint a person to collect and get in all such unclaimed or undistributed funds or dividends, and for the purposes of this section any court having jurisdiction in bankruptcy shall have and at the instance of the person so appointed, or of the Board of Trade, may exercise all the powers conferred by this Act with respect to the discovery and realization of the property of a debtor, and the provisions of Part I. of this Act with respect thereto shall, with any necessary modifications, apply to proceedings under this section.

(3) The provisions of this section shall not, except as expressly declared herein, deprive any person of any larger or other right or remedy to which he may be entitled against such trustee or other person.

(4) Any person claiming to be entitled to any moneys paid in to the Bankruptcy Estates Account pursuant to this section may apply to the Board of Trade for payment to him of the same, and the Board of Trade, if satisfied that the person claiming is entitled, shall make an order for the payment to such person of the sum due.

Any person dissatisfied with the decision of the Board of Trade in respect of his claim may appeal to the High Court.

(5) The Board of Trade may at any time after the passing of this Act open the account at the Bank of England referred to in this Act as the Bankruptcy Estates Account.

#### *Punishment of Fraudulent Debtors.*

Extension  
of penal  
provisions of  
32 & 33 Vict.  
c. 62, to  
petitioning  
debtors, etc.

163.—(1) Sections eleven and twelve of the Debtors Act, 1869, relating to the punishment of fraudulent debtors and imposing a penalty for absconding with property, shall have effect as if there were substituted therein for the words "if after the presentation of a bankruptcy petition against him," the words, "if after the presentation of a bankruptcy petition by or against him."

(2) The provisions of the Debtors Act, 1869, as to offences by bankrupts shall apply to any person whether a trader or not in respect of

whose estate a receiving order has been made as if the term "bankrupt" in that Act included a person in respect of whose estate a receiving order had been made. 46 & 47 VICT.  
C. 52.

164.—Section sixteen of the Debtors Act, 1869, shall be construed and have effect as if the term "a trustee in any bankruptcy" included the official receiver of a bankrupt's estate, and shall apply to offences under this Act as well as to offences under the Debtors Act, 1869. Power for  
Court to  
order prose-  
cution on  
report of  
official re-  
ceiver.

165.—(1) Where there is, in the opinion of the Court, ground to believe that the bankrupt or any other person has been guilty of any offence which is by statute made a misdemeanour in cases of bankruptcy, the Court may commit the bankrupt or such other person for trial. Power for  
Court to  
commit for  
trial.

(2) For the purpose of committing the bankrupt or such other person for trial the Court shall have all the powers of a stipendiary magistrate as to taking depositions, binding over witnesses to appear, admitting the accused to bail, or otherwise.

Nothing in this sub-section shall be construed as derogating from the powers or jurisdiction of the High Court.

166.—Where the Court orders the prosecution of any person for any offence under the Debtors Act, 1869, or Acts amending it, or for any offence arising out of or connected with any bankruptcy proceedings, it shall be the duty of the Director of Public Prosecutions to institute and carry on the prosecution. Public  
Prosecutor  
to act in  
certain cases.

167.—Where a debtor has been guilty of any criminal offence he shall not be exempt from being proceeded against therefor by reason that he has obtained his discharge or that a composition or scheme of arrangement has been accepted or approved. Criminal  
liability  
after dis-  
charge or  
composition.

#### *Interpretation.*

168.—(1) In this Act, unless the context otherwise requires—

"The Court" means the Court having jurisdiction in bankruptcy under this Act: Interpreta-  
tion of  
terms.

"Affidavit" includes statutory declarations, affirmations, and attestations on honour:

"Available act of bankruptcy" means any act of bankruptcy available for a bankruptcy petition at the date of the presentation of the petition on which the receiving order is made:

"Debt provable in bankruptcy" or "provable debt" includes any debt or liability by this Act made provable in bankruptcy:

"Gazetted" means published in the London Gazette:

"General rules" includes forms:

"Goods" includes all chattels personal:

"High Court" means Her Majesty's High Court of Justice:

"Local Bank" means any bank in or in the neighbourhood of the bankruptcy district in which the proceedings are taken:

"Oath" includes affirmation, statutory declaration, and attestation on honour:

"Ordinary resolution" means a resolution decided by a majority in value of the creditors present, personally or by proxy, at a meeting of creditors and voting on the resolution:

"Person" includes a body of persons corporate or unincorporate:

"Prescribed" means prescribed by general rules within the meaning of this Act:

"Property" includes money, goods, things in action, land, and every description of property, whether real or personal and whether situate in England or elsewhere; also, obligations, easements, and every description of estate, interest, and profit, present or future, vested or contingent, arising out of or incident to property as above defined:

"Resolution" means ordinary resolution:

"Secured creditor" means a person holding a mortgage charge or lien

46 & 47 Vict.  
c. 52.

on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor:

"Schedule" means schedule to this Act:

"Sheriff" includes any officer charged with the execution of a writ or other process:

"Special resolution" means a resolution decided by a majority in number and three fourths in value of the creditors present, personally or by proxy, at a meeting of creditors and voting on the resolution:

"Treasury" means the Commissioners of Her Majesty's Treasury:

"Trustee" means the trustee in bankruptcy of a debtor's estate.

(2) The schedules to this Act shall be construed and have effect as part of this Act.

#### *Repeal.*

Repeal of  
enactments.

169.—(1) The enactments described in the Fifth Schedule are hereby repealed as from the commencement of this Act to the extent mentioned in that Schedule.

(2) The repeal effected by this Act shall not affect—

(a) anything done or suffered before the commencement of this Act under any enactment repealed by this Act; nor

(b) any right or privilege acquired, or duty imposed, or liability or disqualification incurred, under any enactment so repealed; nor

(c) any fine, forfeiture, or other punishment incurred or to be incurred in respect of any offence committed or to be committed against any enactment so repealed; nor

(d) the institution or continuance of any proceeding or other remedy, whether under any enactment so repealed, or otherwise, for ascertaining any such liability or disqualification, or enforcing or recovering any such fine, forfeiture, or punishment, as aforesaid.

(3) Notwithstanding the repeal effected by this Act, the proceedings under any bankruptcy petition, liquidation by arrangement, or composition with creditors under the Bankruptcy Act, 1869, pending at the commencement of this Act shall, except so far as any provision of this Act is expressly applied to pending proceedings, continue, and all the provisions of the Bankruptcy Act, 1869, shall, except as aforesaid, apply thereto, as if this Act had not passed.

Proceedings  
under 32 &  
33 Vict.  
c. 71, ss. 125,  
126.

170.—After the passing of this Act no composition or liquidation by arrangement under sections 125 and 126 of the Bankruptcy Act, 1869, shall be entered into or allowed without the sanction of the court or registrar having jurisdiction in the matter; such sanction shall not be granted unless the composition or liquidation appears to the court or registrar to be reasonable and calculated to benefit the general body of creditors.

## SCHEDULES.

Section 15.

### THE FIRST SCHEDULE.

#### MEETINGS OF CREDITORS.

1.—The first meeting of creditors shall be summoned for a day not later than fourteen days after the date of the receiving order, unless the Court for any special reason deem it expedient that the meeting be summoned for a later day.

2.—The official receiver shall summon the meeting by giving not less than seven days' notice of the time and place thereof in the London Gazette and in a local paper.

3.—The official receiver shall also, as soon as practicable, send to each



creditor mentioned in the debtor's statement of affairs, a notice of the time and place of the first meeting of creditors, accompanied by a summary of the debtor's statement of affairs, including the causes of his failure, and any observations thereon which the official receiver may think fit to make; but the proceedings at the first meeting shall not be invalidated by reason of any such notice or summary not having been sent or received before the meeting.

46 & 47 VICT.  
C. 52.

4.—The meeting shall be held at such place as is in the opinion of the official receiver most convenient for the majority of the creditors.

5.—The official receiver or the trustee may at any time summon a meeting of creditors, and shall do so whenever so directed by the Court, or so requested in writing by one fourth in value of the creditors.

6.—Meetings subsequent to the first meeting shall be summoned by sending notice of the time and place thereof to each creditor at the address given in his proof, or if he has not proved, at the address given in the debtor's statement of affairs, or at such other address as may be known to the person summoning the meeting.

7.—The official receiver, or some person nominated by him shall be the chairman at the first meeting. The chairman at subsequent meetings shall be such person as the meeting by resolution appoint.

8.—A person shall not be entitled to vote as a creditor at the first or any other meeting of creditors unless he has duly proved a debt provable in bankruptcy to be due to him from the debtor, and the proof has been duly lodged before the time appointed for the meeting.

9.—A creditor shall not vote at any such meeting in respect of any unliquidated or contingent debt, or any debt the value of which is not ascertained.

10.—For the purpose of voting, a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance (if any) due to him, after deducting the value of his security. If he votes in respect of his whole debt he shall be deemed to have surrendered his security unless the Court on application is satisfied that the omission to value the security has arisen from inadvertence.

11.—A creditor shall not vote in respect of any debt on or secured by a current bill of exchange or promissory note held by him, unless he is willing to treat the liability to him thereon of every person who is liable thereon antecedently to the debtor, and against whom a receiving order has not been made, as a security in his hands, and to estimate the value thereof, and for the purposes of voting, but not for the purposes of dividend, to deduct it from his proof.

12.—It shall be competent to the trustee or to the official receiver, within twenty-eight days after a proof estimating the value of a security as aforesaid has been made use of in voting at any meeting, to require the creditor to give up the security for the benefit of the creditors generally on payment of the value so estimated, with an addition thereto of twenty per centum. Provided, that where a creditor has put a value on such security, he may, at any time before he has been required to give up such security as aforesaid, correct such valuation by a new proof, and deduct such new value from his debt, but in that case such addition of twenty per centum shall not be made if the trustee requires the security to be given up.

13.—If a receiving order is made against one partner of a firm, any creditor to whom that partner is indebted jointly with the other partners of the firm, or any of them, may prove his debt for the purpose of voting at any meeting of creditors, and shall be entitled to vote thereat.

14.—The chairman of a meeting shall have power to admit or reject a proof for the purpose of voting, but his decision shall be subject to appeal to the Court. If he is in doubt whether the proof of a creditor

46 & 47 VICT. c. 52. should be admitted or rejected he shall mark the proof as objected to and shall allow the creditor to vote, subject to the vote being declared invalid in the event of the objection being sustained.

15.—A creditor may vote either in person or by proxy.

16.—Every instrument of proxy shall be in the prescribed form, and shall be issued by the official receiver, or, after the appointment of a trustee, by the trustee, and every insertion therein shall be in the handwriting of the person giving the proxy.

17.—A creditor may give a general proxy to his manager or clerk, or any other person in his regular employment. In such case the instrument of proxy shall state the relation in which the person to act thereunder stands to the creditor.

18.—A creditor may give a special proxy to any person to vote at any specified meeting, or adjournment thereof, for or against any specific resolution, or for or against any specified person as trustee, or member of a committee of inspection.

19.—A proxy shall not be used unless it is deposited with the official receiver or trustee before the meeting at which it is to be used.

20.—Where it appears to the satisfaction of the Court that any solicitation has been used by or on behalf of a trustee or receiver in obtaining proxies, or in procuring the trusteeship or receivership, except by the direction of a meeting of creditors, the Court shall have power, if it think fit, to order that no remuneration shall be allowed to the person by whom or on whose behalf such solicitation may have been exercised, notwithstanding any resolution of the committee of inspection or of the creditors to the contrary.

21.—A creditor may appoint the official receiver of the debtor's estate to act in manner prescribed as his general or special proxy.

22.—The chairman of a meeting may, with the consent of the meeting, adjourn the meeting from time to time, and from place to place.

23.—A meeting shall not be competent to act for any purpose, except the election of a chairman, the proving of debts, and the adjournment of the meeting, unless there are present, or represented thereat, at least three creditors, or all the creditors if their number does not exceed three.

24.—If within half an hour from the time appointed for the meeting a quorum of creditors is not present or represented, the meeting shall be adjourned to the same day in the following week at the same time and place, or to such other day as the chairman may appoint, not being less than seven or more than twenty-one days.

25.—The chairman of every meeting shall cause minutes of the proceedings at the meeting to be drawn up, and fairly entered in a book kept for that purpose, and the minutes shall be signed by him or by the chairman of the next ensuing meeting.

26.—No person acting either under a general or special proxy shall vote in favour of any resolution which would directly or indirectly place himself, his partner or employer, in a position to receive any remuneration out of the estate of the debtor otherwise than as a creditor rateably with the other creditors of the debtor. Provided that where any person holds special proxies to vote for the appointment of himself as trustee he may use the said proxies and vote accordingly.

#### Section 39.

### THE SECOND SCHEDULE.

#### PROOF OF DEBTS.

##### *Proof in ordinary Cases.*

1.—Every creditor shall prove his debt as soon as may be after the making of a receiving order.

2.—A debt may be proved by delivering or sending through the post in

a prepaid letter to the official receiver, or, if a trustee has been appointed, to the trustee, an affidavit verifying the debt. 46 & 47 Vict.  
c. 52.

3.—The affidavit may be made by the creditor himself, or by some person authorized by or on behalf of the creditor. If made by a person so authorized it shall state his authority and means of knowledge.

4.—The affidavit shall contain or refer to a statement of account showing the particulars of the debt, and shall specify the vouchers, if any, by which the same can be substantiated. The official receiver or trustee may at any time call for the production of the vouchers.

5.—The affidavit shall state whether the creditor is or is not a secured creditor.

6.—A creditor shall bear the cost of proving his debt, unless the Court otherwise specially orders.

7.—Every creditor who has lodged a proof shall be entitled to see and examine the proofs of other creditors before the first meeting, and at all reasonable times.

8.—A creditor proving his debt shall deduct therefrom all trade discounts, but he shall not be compelled to deduct any discount, not exceeding five per centum on the net amount of his claim, which he may have agreed to allow for payment in cash.

*Proof by secured Creditors.*

9.—If a secured creditor realizes his security, he may prove for the balance due to him, after deducting the net amount realized.

10.—If a secured creditor surrenders his security to the official receiver or trustee for the general benefit of the creditors, he may prove for his whole debt.

11.—If a secured creditor does not either realize or surrender his security he shall, before ranking for dividend, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed.

12.—(a) Where a security is so valued the trustee may at any time redeem it on payment to the creditor of the assessed value.

(b) If the trustee is dissatisfied with the value at which a security is assessed, he may require that the property comprised in any security so valued be offered for sale at such times and on such terms and conditions as may be agreed on between the creditor and the trustee, or as, in default of such agreement, the Court may direct. If the sale be by public auction the creditor, or the trustee on behalf of the estate, may bid or purchase.

(c) Provided that the creditor may at any time, by notice in writing, require the trustee to elect whether he will or will not exercise his power of redeeming the security or requiring it to be realized, and if the trustee does not, within six months after receiving the notice, signify in writing to the creditor his election to exercise the power, he shall not be entitled to exercise it; and the equity of redemption, or any other interest in the property comprised in the security which is vested in the trustee, shall vest in the creditor, and the amount of his debt shall be reduced by the amount at which the security has been valued.

13.—Where a creditor has so valued his security, he may at any time amend the valuation and proof on showing to the satisfaction of the trustee, or the Court, that the valuation and proof were made *bonâ fide* on a mistaken estimate, or that the security has diminished or increased in value since its previous valuation; but every such amendment shall be made at the cost of the creditor, and upon such terms as the Court shall order, unless the trustee shall allow the amendment without application to the Court.

14.—Where a valuation has been amended in accordance with the foregoing rule, the creditor shall forthwith repay any surplus dividend

46 & 47 VICT.  
C. 52.

which he may have received in excess of that to which he would have been entitled on the amended valuation, or, as the case may be, shall be entitled to be paid out of any money for the time being available for dividend any dividend or share of dividend which he may have failed to receive by reason of the inaccuracy of the original valuation, before that money is made applicable to the payment of any future dividend, but he shall not be entitled to disturb the distribution of any dividend declared before the date of the amendment.

15.—If a creditor after having valued his security subsequently realizes it, or if it is realized under the provisions of Rule 12, the net amount realized shall be substituted for the amount of any valuation previously made by the creditor, and shall be treated in all respects as an amended valuation made by the creditor.

16.—If a secured creditor does not comply with the foregoing rules he shall be excluded from all share in any dividend.

17.—Subject to the provisions of Rule 12, a creditor shall in no case receive more than twenty shillings in the pound, and interest as provided by this Act.

*Proof in respect of Distinct Contracts.*

18.—If a debtor was at the date of the receiving order liable in respect of distinct contracts as a member of two or more distinct firms, or as a sole contractor, and also as member of a firm, the circumstance that the firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof in respect of the contracts, against the properties respectively liable on the contracts.

*Periodical Payments.*

19.—When any rent or other payment falls due at stated periods, and the receiving order is made at any time other than one of those periods, the person entitled to the rent or payment may prove for a proportionate part thereof up to the date of the order as if the rent or payment grew due from day to day.

*Interest.*

20.—On any debt or sum certain, payable at a certain time or otherwise, whereon interest is not reserved or agreed for, and which is overdue at the date of the receiving order and provable in bankruptcy, the creditor may prove for interest at a rate not exceeding four per centum per annum to the date of the order from the time when the debt or sum was payable, if the debt or sum is payable by virtue of a written instrument at a certain time, and if payable otherwise, then from the time when a demand in writing has been made giving the debtor notice that interest will be claimed from the date of the demand until the time of payment.

*Debt payable at a future time.*

21.—A creditor may prove for a debt not payable when the debtor committed an act of bankruptcy as if it were payable presently, and may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of five pounds per centum per annum computed from the declaration of a dividend to the time when the debt would have become payable, according to the terms on which it was contracted.

*Admission or Rejection of Proofs.*

22.—The trustee shall examine every proof and the grounds of the debt, and in writing admit or reject it, in whole or in part, or require further evidence in support of it. If he rejects a proof he shall state in writing to the creditor the grounds of the rejection.

23.—If the trustee thinks that a proof has been improperly admitted, the Court may, on the application of the trustee, after notice to the creditor who made the proof, expunge the proof or reduce its amount.

24.—If a creditor is dissatisfied with the decision of the trustee in respect of a proof, the Court may, on the application of the creditor, reverse or vary the decision. 46 & 47 VICT.  
c. 52.

25.—The Court may also expunge or reduce a proof upon the application of a creditor if the trustee declines to interfere in the matter, or, in the case of a composition or scheme, upon the application of the debtor.

26.—For the purpose of any of his duties in relation to proofs, the trustee may administer oaths and take affidavits.

27.—The official receiver, before the appointment of a trustee, shall have all the powers of a trustee with respect to the examination, admission, and rejection of proofs, and any act or decision of his in relation thereto shall be subject to the like appeal.

### THE THIRD SCHEDULE.

Section 96.

#### LIST OF METROPOLITAN COUNTY COURTS.

The Bloomsbury County Court of Middlesex.  
The Bow County Court of Middlesex.  
The Brompton County Court of Middlesex.  
The Clerkenwell County Court of Middlesex.  
The Lambeth County Court of Surrey.  
The Marylebone County Court of Middlesex.  
The Shoreditch County Court of Middlesex.  
The Southwark County Court of Surrey.  
The Westminster County Court of Middlesex.  
The Whitechapel County Court of Middlesex.

### THE FOURTH SCHEDULE.

Section 162.

#### STATUTES RELATING TO UNCLAIMED DIVIDENDS.

Session and Chapter.	Title of Act.
7 & 8 Vict. c. 70	- An Act for facilitating arrangements between debtors and creditors.
12 & 13 Vict. c. 106	- The Bankruptcy Law Consolidation Act, 1849.
24 & 25 Vict. c. 134	- The Bankruptcy Act, 1861.
32 & 33 Vict. c. 71	- The Bankruptcy Act, 1869.

### THE FIFTH SCHEDULE.

Section 169.

#### ENACTMENTS REPEALED AS TO ENGLAND.

13 Edw. 1 c. 18. in part.	The statutes of Westminster the Second, chapter eighteen, Execution either by levying of the lands and goods, or by delivery of goods and half the land; at the choice of the creditor; in part; namely, the words "all the chattels of the debtor saving only his oxen and beasts of the plough, and."
32 & 33 Vict. c. 62. in part.	The Debtors Act, 1869. in part; namely, Sub-section (b) of section five, and Sections twenty-one and twenty-two.

46 & 47 VICT. c. 52.	32 & 33 Vict.	The Bankruptcy Act, 1869. c. 71.
	32 & 33 Vict.	The Bankruptcy Repeal and Insolvent Court Act, 1869. c. 88.
	in part.	in part; namely, Section nineteen.
	33 & 34 Vict.	The Absconding Debtors Act, 1870. c. 76.
	34 & 35 Vict.	The Bankruptcy Disqualification Act, 1871. c. 50.
	38 & 39 Vict.	The Supreme Court of Judicature Act, 1875. c. 77.
	in part.	in part; namely, Sections nine and thirty-two.

**46 & 47 VICT. c. 61 (*The Agricultural Holdings (England) Act, 1883*).**

46 & 47 VICT. c. 61.	<i>An Act for amending the Law relating to Agricultural Holdings in England.</i> [25th August, 1883.]
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Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

PART I.

IMPROVEMENTS.

*Compensation for Improvements.*

General  
right of  
tenant to  
compensa-  
tion.

1.—Subject as in this Act mentioned, where a tenant has made on his holding any improvement comprised in the First Schedule hereto, he shall, on and after the commencement of this Act, be entitled on quitting his holding at the determination of a tenancy to obtain from the landlord as compensation under this Act for such improvement such sum as fairly represents the value of the improvement to an incoming tenant: Provided always, that in estimating the value of any improvement in the First Schedule hereto there shall not be taken into account as part of the improvement made by the tenant what is justly due to the inherent capabilities of the soil.

*As to Improvements executed before the commencement of Act.*

Restriction  
as to im-  
provements  
before Act.

2.—Compensation under this Act shall not be payable in respect of improvements executed before the commencement of this Act, with the exceptions following, that—

38 & 39 Vict.  
c. 92.

- (1) Where a tenant has within ten years before the commencement of this Act made an improvement mentioned in the third part of the First Schedule hereto, and he is not entitled under any contract, or custom, or under the Agricultural Holdings (England) Act, 1875, to compensation in respect of such improvement; or
- (2) Where a tenant has executed an improvement mentioned in the first or second part of the said First Schedule within ten years previous to the commencement of this Act, and he is not entitled under any contract, or custom, or under the Agricultural Holdings (England) Act, 1875, to compensation in respect of such improvement, and the landlord within one year after the commencement of this Act declares in writing his consent to the making of such improvement, then such tenant on quitting his holding at the determination



of a tenancy after the commencement of this Act may claim compensation under this Act in respect of such improvement in the same manner as if this Act had been in force at the time of the execution of such improvement.

46 & 47 VICT.  
c. 61.

*As to Improvements executed after the commencement of Act.*

3.—Compensation under this Act shall not be payable in respect of any improvement mentioned in the first part of the First Schedule hereto, and executed after the commencement of this Act, unless the landlord, or his agent duly authorized in that behalf, has, previously to the execution of the improvement and after the passing of this Act, consented in writing to the making of such improvement, and any such consent may be given by the landlord unconditionally, or upon such terms as to compensation, or otherwise, as may be agreed upon between the landlord and the tenant, and in the event of any agreement being made between the landlord and the tenant, any compensation payable thereunder shall be deemed to be substituted for compensation under this Act.

Consent of  
landlord as  
to improve-  
ment in First  
Schedule,  
Part I.

4.—Compensation under this Act shall not be payable in respect of any improvement mentioned in the second part of the First Schedule hereto, and executed after the commencement of this Act, unless the tenant has, not more than three months and not less than two months before beginning to execute such improvement, given to the landlord, or his agent duly authorised in that behalf, notice in writing of his intention so to do, and of the manner in which he proposes to do the intended work, and upon such notice being given, the landlord and tenant may agree on the terms as to compensation or otherwise on which the improvement is to be executed, and in the event of any such agreement being made, any compensation payable thereunder shall be deemed to be substituted for compensation under this Act, or the landlord may, unless the notice of the tenant is previously withdrawn, undertake to execute the improvement himself, and may execute the same in any reasonable and proper manner which he thinks fit, and charge the tenant with a sum not exceeding five pounds per centum per annum on the outlay incurred in executing the improvement, or not exceeding such annual sum payable for a period of twenty-five years as will repay such outlay in the said period, with interest at the rate of three per centum per annum, such annual sum to be recoverable as rent. In default of any such agreement or undertaking, and also in the event of the landlord failing to comply with his undertaking within a reasonable time, the tenant may execute the improvement himself, and shall in respect thereof be entitled to compensation under this Act.

Notice to  
landlord as  
to improve-  
ment in First  
Schedule,  
Part II.

The landlord and tenant may, if they think fit, dispense with any notice under this section, and come to an agreement in a lease or otherwise between themselves in the same manner and of the same validity as if such notice had been given.

5.—Where, in the case of a tenancy under a contract of tenancy current at the commencement of this Act, any agreement in writing or custom, or the Agricultural Holdings (England) Act, 1875, provides specific compensation for any improvement comprised in the first Schedule hereto, compensation in respect of such improvement, although executed after the commencement of this Act, shall be payable in pursuance of such agreement, custom, or Act of Parliament, and shall be deemed to be substituted for compensation under this Act.

Reservation  
as to existing  
and future  
contracts of  
tenancy.

Where in the case of a tenancy under a contract of tenancy beginning after the commencement of this Act, any particular agreement in writing secures to the tenant for any improvement mentioned in the third part of the First Schedule hereto, and executed after the commencement of this Act, fair and reasonable compensation, having regard to the circumstances existing at the time of making such agreement then in such

46 & 47 VICT.  
c. 61.

case the compensation in respect of such improvement shall be payable in pursuance of the particular agreement, and shall be deemed to be substituted for compensation under this Act.

The last preceding provision of this section relating to a particular agreement shall apply in the case of a tenancy under a contract of tenancy current at the commencement of this Act in respect of an improvement mentioned in the third part of the First Schedule hereto, specific compensation for which is not provided by any agreement in writing, or custom, or the Agricultural Holdings Act, 1875.

*Regulations as to Compensation for Improvements.*

Regulations  
as to com-  
pensation for  
improve-  
ments.

6.—In the ascertainment of the amount of the compensation under this Act payable to the tenant in respect of any improvement there shall be taken into account in reduction thereof:

- (a) Any benefit which the landlord has given or allowed to the tenant in consideration of the tenant executing the improvement; and
- (b) In the case of compensation for manures the value of the manure that would have been produced by the consumption on the holding of any hay, straw, roots, or green crops sold off or removed from the holding within the last two years of the tenancy or other less time for which the tenancy has endured, except as far as a proper return of manure to the holding has been made in respect of such produce so sold off or removed therefrom; and
- (c) Any sums due to the landlord in respect of rent or in respect of any waste committed or permitted by the tenant, or in respect of any breach of covenant or other agreement connected with the contract of tenancy committed by the tenant, also any taxes, rates, and tithe rentcharge due or becoming due in respect of the holding to which the tenant is liable as between him and the landlord.

There shall be taken into account in augmentation of the tenant's compensation—

- (d) Any sum due to the tenant for compensation in respect of a breach of covenant or other agreement connected with a contract of tenancy and committed by the landlord.

Nothing in this section shall enable a landlord to obtain under this Act compensation in respect of waste by the tenant or of breach by the tenant committed or permitted in relation to a matter of husbandry more than four years before the determination of the tenancy.

*Procedure.*

Notice of  
intended  
claim.

7.—A tenant claiming compensation under this Act shall, two months at least before the determination of the tenancy, give notice in writing to the landlord of his intention to make such claim.

Where a tenant gives such notice, the landlord may, before the determination of the tenancy, or within fourteen days thereafter, give a counter-notice in writing to the tenant of his intention to make a claim in respect of any waste or any breach of covenant or other agreement.

Every such notice and counter-notice shall state, as far as reasonably may be, the particulars and amount of the intended claim.

Compensa-  
tion agreed  
or settled by  
reference.

8.—The landlord and the tenant may agree on the amount and mode and time of payment of compensation to be paid under this Act.

If in any case they do not so agree the difference shall be settled by a reference.

Appoint-  
ment of  
referee or  
referees and  
umpire.

9.—Where there is a reference under this Act, a referee, or two referees and an umpire, shall be appointed as follows:—

- (1) If the parties concur, there may be a single referee appointed by them jointly:
- (2) If before award the single referee dies or becomes incapable of



acting, or for seven days after notice from the parties, or either of them, requiring him to act, fails to act, the proceedings shall begin afresh, as if no referee had been appointed: 46 & 47 Vict.  
c. 61.

(3) If the parties do not concur in the appointment of a single referee, each of them shall appoint a referee:

(4) If before award one of two referees dies or becomes incapable of acting, or for seven days after notice from either party requiring him to act, fails to act, the party appointing him shall appoint another referee:

(5) Notice of every appointment of a referee by either party shall be given to the other party:

(6) If for fourteen days after notice by one party to the other to appoint a referee, or another referee, the other party fails to do so, then, on the application of the party giving notice, the county court shall within fourteen days appoint a competent and impartial person to be a referee:

(7) Where two referees are appointed, then (subject to the provisions of this Act) they shall before they enter on the reference appoint an umpire:

(8) If before award an umpire dies or becomes incapable of acting, the referees shall appoint another umpire:

(9) If for seven days after request from either party the referees fail to appoint an umpire, or another umpire, then, on the application of either party, the county court shall within fourteen days appoint a competent and impartial person to be the umpire.

(10) Every appointment, notice, and request under this section shall be in writing.

10.—Provided that, where two referees are appointed, an umpire may be appointed as follows: Requisition for appointment of umpire by Land Commissioners, etc.

(1) If either party, on appointing a referee, requires, by notice in writing to the other, that the umpire shall be appointed by the Land Commissioners for England, then the umpire, and any successor to him, shall be appointed, on the application of either party, by those commissioners.

(2) In every other case, if either party on appointing a referee requires, by notice in writing to the other, that the umpire shall be appointed by the county court, then, unless the other party dissents by notice in writing therefrom, the umpire, and any successor to him, shall on the application of either party be so appointed, and in case of such dissent the umpire, and any successor to him, shall be appointed, on the application of either party, by the Land Commissioners for England.

11.—The powers of the county court under this Act relative to the appointment of a referee or umpire shall be exercisable by the judge of the court having jurisdiction, whether he is without or within his district, and may, by consent of the parties, be exercised by the registrar of the court. Exercise of powers of county court.

12.—The delivery to a referee of his appointment shall be deemed a submission to a reference by the party delivering it; and neither party shall have power to revoke a submission, or the appointment of a referee, without the consent of the other. Mode of submission to reference.

13.—The referee or referees or umpire may call for the production of any sample, or voucher, or other document, or other evidence which is in the possession or power of either party, or which either party can produce, and which to the referee or referees or umpire seems necessary for determination of the matters referred, and may take the examination of the parties and witnesses on oath, and may administer oaths and take affirmations; and if any person so sworn or affirming wilfully and corruptly gives false evidence he shall be guilty of perjury. Power for referee, etc., to require production of documents, administer oaths, etc.

14.—The referee or referees or umpire may proceed in the absence of Power to

46 & 47 Vict. c. 61. either party where the same appears to him or them expedient, after notice given to the parties.

proceed in absence.

Form of award.

Time for award of referee or referees.

Award in respect of compensation under ss. 3, 4, and 5.

Reference to and award by umpire.

Award to give particulars.

Costs of reference.

Day for payment.

15.—The award shall be in writing, signed by the referee or referees or umpire.

16.—A single referee shall make his award ready for delivery within twenty-eight days after his appointment.

Two referees shall make their award ready for delivery within twenty-eight days after the appointment of the last appointed of them, or within such extended time (if any) as they from time to time jointly fix by writing under their hands, so that they make their award ready for delivery within a time not exceeding in the whole forty-nine days after the appointment of the last appointed of them.

17.—In any case provided for by sections three, four, or five, if compensation is claimed under this Act, such compensation as under any of those sections is to be deemed to be substituted for compensation under this Act, if and so far as the same can, consistently with the terms of the agreement, if any, be ascertained by the referees or the umpire, shall be awarded in respect of any improvements thereby provided for, and the award shall, when necessary, distinguish such improvements and the amount awarded in respect thereof; and an award given under this section shall be subject to the appeal provided by this Act.

18.—Where two referees are appointed and act, if they fail to make their award ready for delivery within the time aforesaid, then, on the expiration of that time, their authority shall cease, and thereupon the matters referred to them shall stand referred to the umpire.

The umpire shall make his award ready for delivery within twenty-eight days after notice in writing given to him by either party or referee of the reference to him, or within such extended time (if any) as the registrar of the county court from time to time appoints, on the application of the umpire or of either party, made before the expiration of the time appointed by or extended under this section.

19.—The award shall not award a sum generally for compensation, but shall, so far as possible, specify—

- (a) The several improvements, acts, and things in respect whereof compensation is awarded, and the several matters and things taken into account under the provisions of this Act in reduction or augmentation of such compensation;
- (b) The time at which each improvement, act, or thing was executed, done, committed, or permitted;
- (c) The sum awarded in respect of each improvement, act, matter, and thing; and
- (d) Where the landlord desires to charge his estate with the amount of compensation found due to the tenant, the time at which, for the purposes of such charge, each improvement, act, or thing in respect of which compensation is awarded is to be deemed to be exhausted.

20.—The costs of and attending the reference, including the remuneration of the referee or referees and umpire, where the umpire has been required to act, and including other proper expenses, shall be borne and paid by the parties in such proportion as to the referee or referees or umpire appears just, regard being had to the reasonableness or unreasonableness of the claim of either party in respect of amount, or otherwise, and to all the circumstances of the case.

The award may direct the payment of the whole or any part of the costs aforesaid by the one party to the other.

The costs aforesaid shall be subject to taxation by the registrar of the county court, on the application of either party, but that taxation shall be subject to review by the judge of the county court.

21.—The award shall fix a day, not sooner than one month after the

delivery of the award, for the payment of money awarded for compensation, costs, or otherwise. 46 & 47 Vict. c. 61.

22.—A submission or award shall not be made a rule of any court, or be removable by any process into any court, and an award shall not be questioned otherwise than as provided by this Act. Submission not to be removable, etc.

23.—Where the sum claimed for compensation exceeds one hundred pounds, either party may, within seven days after delivery of the award, appeal against it to the judge of the county court on all or any of the following grounds: Appeal to county court.

(1) That the award is invalid;

(2) That the award proceeds wholly or in part upon an improper application of or upon the omission properly to apply the special provisions of sections three, four, or five of this Act;

(3) That compensation has been awarded for improvements, acts, or things, breaches of covenants or agreements, or for committing or permitting waste, in respect of which the party claiming was not entitled to compensation;

(4) That compensation has not been awarded for improvements, acts, or things, breaches of covenants or agreements, or for committing or permitting waste, in respect of which the party claiming was entitled to compensation;

and the judge shall hear and determine the appeal, and may, in his discretion, remit the case to be reheard as to the whole or any part thereof by the referee or referees or umpire, with such directions as he may think fit.

If no appeal is so brought, the award shall be final.

The decision of the judge of the county court on appeal shall be final, save that the judge shall, at the request of either party, state a special case on a question of law for the judgment of the High Court of Justice, and the decision of the High Court on the case, and respecting costs and any other matter connected therewith, shall be final, and the judge of the county court shall act thereon.

24.—Where any money agreed or awarded or ordered on appeal to be paid for compensation, costs, or otherwise, is not paid within fourteen days after the time when it is agreed or awarded or ordered to be paid, it shall be recoverable, upon order made by the judge of the county court, as money ordered by a county court under its ordinary jurisdiction to be paid is recoverable. Recovery of compensation.

25.—Where a landlord or tenant is an infant without a guardian, or is of unsound mind, not so found by inquisition, the county court, on the application of any person interested, may appoint a guardian of the infant or person of unsound mind for the purposes of this Act, and may change the guardian if and as occasion requires. Appointment of guardian.

26.—Where the appointment of a person to act as the next friend of a married woman is required for the purposes of this Act, the county court may make such appointment, and may remove or change that next friend if and as occasion requires. Provisions respecting married women.

A woman married before the commencement of the Married Women's Property Act, 1882, entitled for her separate use to land, her title to which accrued before such commencement as aforesaid, and not restrained from anticipation, shall, for the purposes of this Act, be in respect of land as if she was unmarried. 45 & 46 Vict. c. 75.

Where any other woman married before the commencement of the Married Women's Property Act, 1882, is desirous of doing any act under this Act in respect of land, her title to which accrued before such commencement as aforesaid, her husband's concurrence shall be requisite, and she shall be examined apart from him by the county court, or by the judge of the county court for the place where she for the time being is, touching her knowledge of the nature and effect of the intended act, and it shall be ascertained that she is acting freely and voluntarily.

46 & 47 Vict.  
c. 61.

Costs in  
county  
court.

Service of  
notice, etc.

27.—The costs of proceedings in the county court under this Act shall be in the discretion of the court.

The Lord Chancellor may from time to time prescribe a scale of costs for those proceedings, and of costs to be taxed by the registrar of the court.

28.—Any notice, request, demand, or other instrument under this Act may be served on the person to whom it is to be given, either personally or by leaving it for him at his last known place of abode in England, or by sending it through the post in a registered letter addressed to him there; and if so sent by post it shall be deemed to have been served at the time when the letter containing it would be delivered in ordinary course; and in order to prove service by letter it shall be sufficient to prove that the letter was properly addressed and posted, and that it contained the notice, request, demand, or other instrument to be served.

*Charge of Tenant's Compensation.*

Power for  
landlord on  
paying com-  
pensation to  
obtain  
charge.

29.—A landlord, on paying to the tenant the amount due to him in respect of compensation under this Act, or in respect of compensation authorised by this Act to be substituted for compensation under this Act, or on expending such amount as may be necessary to execute an improvement under the second part of the First Schedule hereto, after notice given by the tenant of his intention to execute such improvement in accordance with this Act, shall be entitled to obtain from the county court a charge on the holding, or any part thereof, to the amount of the sum so paid or expended.

The court shall, on proof of the payment or expenditure, and on being satisfied of the observance in good faith by the parties of the conditions imposed by this Act, make an order charging the holding, or any part thereof, with repayment of the amount paid or expended, with such interest, and by such instalments, and with such directions for giving effect to the charge, as the court thinks fit.

But, where the landlord obtaining the charge is not absolute owner of the holding for his own benefit, no instalment or interest shall be made payable after the time when the improvement in respect whereof compensation is paid will, where an award has been made, be taken to have been exhausted according to the declaration of the award, and in any other case after the time when any such improvement will, in the opinion of the court, after hearing such evidence (if any) as it thinks expedient, have become exhausted.

The instalments and interest shall be charged in favour of the landlord, his executors, administrators, and assigns.

The estate or interest of any landlord holding for an estate or interest determinable or liable to forfeiture by reason of his creating or suffering any charge thereon shall not be determined or forfeited by reason of his obtaining a charge under this Act, anything in any deed, will, or other instrument to the contrary thereof notwithstanding.

45 & 46 Vict.  
c. 88.

Capital money arising under the Settled Land Act, 1882, may be applied in payment of any moneys expended and costs incurred by a landlord under or in pursuance of this Act in or about the execution of any improvement mentioned in the first or second parts of the schedule hereto, as for an improvement authorized by the said Settled Land Act; and such money may also be applied in discharge of any charge created on a holding under or in pursuance of this Act in respect of any such improvement as aforesaid, as in discharge of an incumbrance authorized by the said Settled Land Act to be discharged out of such capital money.

Incidence of  
charge.

30.—The sum charged by the order of a county court under this Act shall be a charge on the holding, or the part thereof charged, for the landlord's interest therein, and for all interests therein subsequent to

that of the landlord; but so that the charge shall not extend beyond the interest of the landlord, his executors, administrators, and assigns, in the tenancy where the landlord is himself a tenant of the holding. 46 & 47 Vict.  
c. 61.

31.—Where the landlord is a person entitled to receive the rents and profits of any holding as trustee, or in any character otherwise than for his own benefit, the amount due from such landlord in respect of compensation under this Act, or in respect of compensation authorized by this Act to be substituted for compensation under this Act, shall be charged and recovered as follows and not otherwise; (that is to say,)

Provision in  
case of  
trustee.

- (1) The amount so due shall not be recoverable personally against such landlord, nor shall he be under any liability to pay such amount, but the same shall be a charge on and recoverable against the holding only.
- (2) Such landlord shall, either before or after having paid to the tenant the amount due to him, be entitled to obtain from the county court a charge on the holding to the amount of the sum required to be paid or which has been paid, as the case may be, to the tenant.
- (3) If such landlord neglect or fail within one month after the tenant has quitted his holding to pay to the tenant the amount due to him, then after the expiration of such one month the tenant shall be entitled to obtain from the county court in favour of himself, his executors, administrators, and assigns, a charge on the holding to the amount of the sum due to him, and of all costs properly incurred by him in obtaining the charge or in raising the amount due thereunder.
- (4) The court shall on proof of the tenant's title to have a charge made in his favour make an order charging the holding with payment of the amount of the charge, including costs, in like manner and form as in case of a charge which a landlord is entitled to obtain.

32.—Any company now or hereafter incorporated by Parliament, and having power to advance money for the improvement of land, may take an assignment of any charge made by a county court under the provisions of this Act, upon such terms and conditions as may be agreed upon between such company and the person entitled to such charge; and such company may assign any charge so acquired by them to any person or persons whomsoever. Advance  
made by a  
company.

#### *Notice to Quit.*

33.—Where a half-year's notice, expiring with a year of tenancy is by law necessary and sufficient for determination of a tenancy from year to year, in the case of any such tenancy under a contract of tenancy made either before or after the commencement of this Act, a year's notice so expiring shall by virtue of this Act be necessary and sufficient for the same, unless the landlord and tenant of the holding, by writing under their hands, agree that this section shall not apply, in which case a half-year's notice shall continue to be sufficient; but nothing in this section shall extend to a case where the tenant is adjudged bankrupt, or has filed a petition for a composition or arrangement with his creditors. Time of  
notice to  
quit.

#### *Fixtures.*

34.—Where after the commencement of this Act a tenant affixes to his holding any engine, machinery, fencing, or other fixture, or erects any building for which he is not under this Act or otherwise entitled to compensation, and which is not so affixed or erected in pursuance of some obligation in that behalf or instead of some fixture or building belonging to the landlord, then such fixture or building shall be the property of and be removable by the tenant before or within a reasonable time after the termination of the tenancy. Tenant's  
property in  
fixtures, ma-  
chinery, etc.

46 & 47 Vict.  
c. 61.

Provided as follows:—

- (1) Before the removal of any fixture or building the tenant shall pay all rent owing by him, and shall perform or satisfy all other his obligations to the landlord in respect to the holding:
- (2) In the removal of any fixture or building the tenant shall not do any avoidable damage to any other building or other part of the holding:
- (3) Immediately after the removal of any fixture or building the tenant shall make good all damage occasioned to any other building or other part of the holding by the removal:
- (4) The tenant shall not remove any fixture or building without giving one month's previous notice in writing to the landlord of the intention of the tenant to remove it:
- (5) At any time before the expiration of the notice of removal the landlord, by notice in writing given by him to the tenant, may elect to purchase any fixture or building comprised in the notice of removal, and any fixture or building thus elected to be purchased shall be left by the tenant, and shall become the property of the landlord, who shall pay the tenant the fair value thereof to an incoming tenant of the holding; and any difference as to the value shall be settled by a reference under this Act, as in case of compensation (but without appeal).

*Crown and Duchy Lands.*

Application  
of Act to  
Crown lands.

35.—This Act shall extend and apply to land belonging to Her Majesty the Queen, her heirs and successors, in right of the Crown.

With respect to such land, for the purposes of this Act, the Commissioners of Her Majesty's Woods, Forests, and Land Revenues, or one of them, or other the proper officer or body having charge of such land for the time being, or in case there is no such officer or body, then such person as Her Majesty, her heirs or successors, may appoint in writing under the Royal Sign Manual, shall represent Her Majesty, her heirs and successors, and shall be deemed to be the landlord.

Any compensation payable under this Act by the Commissioners of Her Majesty's Woods, Forests, and Land Revenues, or either of them, in respect of an improvement mentioned in the first or second part of the First Schedule hereto, shall be deemed to be payable in respect of an improvement of land within section one of the Crown Lands Act, 1866, and the amount thereof shall be charged and repaid as in that section provided with respect to the costs, charges, and expenses therein mentioned.

Any compensation payable under this Act by those Commissioners, or either of them, in respect of an improvement mentioned in the third part of the First Schedule hereto, shall be deemed to be part of the expenses of the management of the Land Revenues of the Crown, and shall be payable to those Commissioners out of such money and in such manner as the last-mentioned expenses are by law payable.

Application  
of Act to  
land of  
Duchy of  
Lancaster.

36.—This Act shall extend and apply to land belonging to Her Majesty, her heirs and successors, in right of the Duchy of Lancaster.

With respect to such land for the purposes of this Act, the Chancellor for the time being of the Duchy shall represent Her Majesty, her heirs and successors, and shall be deemed to be the landlord.

The amount of any compensation payable under this Act by the Chancellor of the Duchy in respect of an improvement mentioned in the first or second part of the First Schedule to this Act shall be deemed to be an expense incurred in improvement of land belonging to Her Majesty, her heirs or successors, in right of the Duchy, within section twenty-five of the Act of the fifty-seventh year of King George the Third, chapter ninety-seven, and shall be raised and paid as in that section provided with respect to the expenses therein mentioned.



The amount of any compensation payable under this Act by the Chancellor of the Duchy in respect of an improvement mentioned in the third part of the First Schedule to this Act shall be paid out of the annual revenues of the Duchy. 46 & 47 Vict.  
c. 61.

37.—This Act shall extend and apply to land belonging to the Duchy of Cornwall. Application  
of Act to  
land of  
Duchy of  
Cornwall.

With respect to such land, for the purposes of this Act, such person as the Duke of Cornwall for the time being, or other the personage for the time being entitled to the revenues and possessions of the Duchy of Cornwall, from time to time, by sign manual, warrant, or otherwise, appoints, shall represent the Duke of Cornwall or other the personage aforesaid, and be deemed to be the landlord, and may do any act or thing under this Act which a landlord is authorized or required to do thereunder.

Any compensation payable under this Act by the Duke of Cornwall, or other the personage aforesaid, in respect of an improvement mentioned in the first or second part of the First Schedule to this Act shall be deemed to be payable in respect of an improvement of land within section eight of the Duchy of Cornwall Management Act, 1863, and the amount thereof may be advanced and paid from the money mentioned in that section, subject to the provision therein made for repayment of sums advanced for improvements. 26 & 27 Vict.  
c. 49.

#### *Ecclesiastical and Charity Lands.*

38.—Where lands are assigned or secured as the endowment of a see, the powers by this Act conferred on a landlord shall not be exercised by the archbishop or bishop, in respect of those lands, except with the previous approval in writing of the Estates Committee of the Ecclesiastical Commissioners for England. Landlord,  
archbishop,  
or bishop.

39.—Where a landlord is incumbent of an ecclesiastical benefice, the powers by this Act conferred on a landlord shall not be exercised by him in respect of the glebe land or other land belonging to the benefice, except within the previous approval in writing of the patron of the benefice, that is, the person, officer, or authority who, in case the benefice were vacant, would be entitled to present thereto, or of the Governors of Queen Anne's Bounty (that is, the Governors of the Bounty of Queen Anne for the Augmentation of the Maintenance of the Poor Clergy). Landlord,  
incumbent  
of benefice.

In every such case the Governors of Queen Anne's Bounty may, if they think fit, on behalf of the incumbent, out of any money in their hands, pay to the tenant the amount of compensation due to him under this Act; and thereupon they may, instead of the incumbent, obtain from the county court a charge on the holding, in respect thereof, in favour of themselves.

Every such charge shall be effectual, notwithstanding any change of the incumbent.

40.—The powers by this Act conferred on a landlord in respect of charging the land shall not be exercised by trustees for ecclesiastical or charitable purposes, except with the previous approval in writing of the Charity Commissioners for England and Wales. Landlord,  
charity  
trustees, etc.

#### *Resumption for Improvements, and Miscellaneous.*

41.—Where on a tenancy from year to year a notice to quit is given by the landlord with a view to the use of land for any of the following purposes: Resumption  
of possession  
for cottages,  
etc.

The erection of farm labourers' cottages or other houses, with or without gardens;

The providing of gardens for existing farm labourers' cottages or other houses;

The allotment for labourers of land for gardens or other purposes;

46 & 47 Vict.  
c. 61.

The planting of trees ;

The opening or working of any coal, ironstone, limestone, or other mineral, or of a stone quarry, clay, sand, or gravel pit, or the construction of any works or buildings to be used in connection therewith ;

The obtaining of brick earth, gravel, or sand ;

The making of a watercourse or reservoir ;

The making of any road, railway, tramroad, siding, canal, or basin, or any wharf, pier, or other work connected therewith ;

and the notice to quit so states, then it shall, by virtue of this Act, be no objection to the notice that it relates to part only of the holding.

In every such case the provisions of this Act respecting compensation shall apply as on determination of a tenancy in respect of an entire holding.

The tenant shall also be entitled to a proportionate reduction of rent in respect of the land comprised in the notice to quit, and in respect of any depreciation of the value to him of the residue of the holding, caused by the withdrawal of that land from the holding or by the use to be made thereof, and the amount of that reduction shall be ascertained by agreement or settled by a reference under this Act, as in case of compensation (but without appeal).

The tenant shall further be entitled, at any time within twenty-eight days after service of the notice to quit, to serve on the landlord a notice in writing to the effect that he (the tenant) accepts the same as a notice to quit the entire holding, to take effect at the expiration of the then current year of tenancy ; and the notice to quit shall have effect accordingly.

Provision as  
to limited  
owners.

42.—Subject to the provisions of this Act in relation to Crown, duchy, ecclesiastical, and charity lands, a landlord, whatever may be his estate or interest in his holding, may give any consent, make any agreement, or do or have done to him any act in relation to improvements in respect of which compensation is payable under this Act which he might give or make or do or have done to him if he were in the case of an estate of inheritance owner thereof in fee, and in the case of a leasehold possessed of the whole estate in the leasehold.

Provision in  
case of  
reservation  
of rent.

43.—When, by any Act of Parliament, deed, or other instrument, a lease of a holding is authorized to be made, provided that the best rent, or reservation in the nature of rent, is by such lease reserved, then, whenever any lease of a holding is, under such authority, made to the tenant of the same, it shall not be necessary, in estimating such rent or reservation, to take into account against the tenant the increase (if any) in the value of such holding arising from any improvements made or paid for by him on such holding.

## PART II.

### *Distress.*

Limitation  
of distress  
in respect of  
amount and  
time.

44.—After the commencement of this Act it shall not be lawful for any landlord entitled to the rent of any holding to which this Act applies to distrain for rent, which became due in respect of such holding, more than one year before the making of such distress, except in the case of arrears of rent in respect of a holding to which this Act applies existing at the time of the passing of this Act, which arrears shall be recoverable by distress up to the first day of January one thousand eight hundred and eighty-five to the same extent as if this Act had not passed.

Provided that where it appears that according to the ordinary course of dealing between the landlord and tenant of a holding the payment of the rent of such holding has been allowed to be deferred until the



expiration of a quarter of a year or half a year after the date at which such rent legally became due, then for the purpose of this section the rent of such holding shall be deemed to have become due at the expiration of such quarter or half-year as aforesaid, as the case may be, and not at the date at which it legally became due.

46 & 47 Vict.  
c. 61.

45.—Where live stock belonging to another person has been taken in by the tenant of a holding to which this Act applies to be fed at a fair price agreed to be paid for such feeding by the owner of such stock to the tenant, such stock shall not be distrained by the landlord for rent where there is other sufficient distress to be found, and if so distrained by reason of other sufficient distress not being found, there shall not be recovered by such distress a sum exceeding the amount of the price so agreed to be paid for the feeding, or if any part of such price has been paid exceeding the amount remaining unpaid, and it shall be lawful for the owner of such stock, at any time before it is sold, to redeem such stock by paying to the distrainer a sum equal to such price as aforesaid, and any payment so made to the distrainer shall be in full discharge as against the tenant of any sum of the like amount which would be otherwise due from the owner of the stock to the tenant in respect of the price of feeding: Provided always, that so long as any portion of such live stock shall remain on the said holding the right to distrain such portion shall continue to the full extent of the price originally agreed to be paid for the feeding of the whole of such live stock, or if part of such price has been *bonâ fide* paid to the tenant under the agreement, then to the full extent of the price then remaining unpaid.

Limitation  
of distress  
in respect of  
things to be  
distrained.

Agricultural or other machinery which is the *bonâ fide* property of a person other than the tenant, and is on the premises of the tenant under a *bonâ fide* agreement with him for the hire or use thereof in the conduct of his business, and live stock of all kinds which is the *bonâ fide* property of a person other than the tenant, and is on the premises of the tenant solely for breeding purposes, shall not be distrained for rent in arrear.

46.—Where any dispute arises—

- (a) in respect of any distress having been levied contrary to the provisions of this Act; or
- (b) as to the ownership of any live stock distrained, or as to the price to be paid for the feeding of such stock; or
- (c) as to any other matter or thing relating to a distress on a holding to which this Act applies;

Remedy for  
wrongful  
distress  
under this  
Act.

such dispute may be heard and determined by the county court or by a court of summary jurisdiction, and any such county court or court of summary jurisdiction may make an order for restoration of any live stock or things unlawfully distrained, or may declare the price agreed to be paid in the case where the price of the feeding is required to be ascertained, or may make any other order which justice requires: any such dispute as mentioned in this section shall be deemed to be a matter in which a court of summary jurisdiction has authority by law to make an order on complaint in pursuance of the Summary Jurisdiction Acts; but any person aggrieved by any decision of such court of summary jurisdiction under this section may, on giving such security to the other party as the court may think just, appeal to a court of general or quarter sessions.

47.—Where the compensation due under this Act, or under any custom or contract, to a tenant has been ascertained before the landlord distrains for rent due, the amount of such compensation may be set off against the rent due, and the landlord shall not be entitled to distrain for more than the balance.

Set-off of  
compensation  
against rent.

48.—An order of the county court or of a court of summary jurisdiction under this Act shall not be quashed for want of form, or be removed by certiorari or otherwise into any superior court.

Exclusion of  
certiorari.

46 & 47 Vict.  
c. 61.

Limitation  
of costs in  
case of dis-  
tress.

Repeal of  
2 W. and M.  
c. 5, s. 1, as  
to appraise-  
ment and  
sale at public  
auction.

Extension of  
time to re-  
plevy at  
request of  
tenant.

Bailiffs to be  
appointed by  
county court  
judges.

49.—No person whatsoever making any distress for rent on a holding to which this Act applies when the sum demanded and due shall exceed the sum of twenty pounds for or in respect of such rent shall be entitled to any other or more costs and charges for and in respect of such distress or any matter or thing done therein than such as are fixed and set forth in the Second Schedule hereto.

50.—So much of an Act passed in the second year of the reign of their Majesties King William the Third and Mary, chapter five, as requires appraisement before sale of goods distrained is hereby repealed as respects any holding to which this Act applies, and the landlord or other person levying a distress on such holding may sell the goods and chattels distrained without causing them to be previously appraised; and for the purposes of sale the goods and chattels distrained shall, at the request in writing of the tenant or owner of such goods and chattels, be removed to a public auction room or to some other fit and proper place specified in such request, and be there sold. The costs and expenses attending any such removal, and any damage to the goods and chattels arising therefrom, shall be borne and paid by the party requesting the removal.

51.—The period of five days provided in the said Act of William and Mary, chapter five, within which the tenant or owner of goods and chattels distrained may replevy the same shall, in the case of any distress on a holding to which this Act applies, be extended to a period of not more than fifteen days, if the tenant or such owner make a request in writing in that behalf to the landlord or other person levying the distress, and also give security for any additional costs that may be occasioned by such extension of time. Provided that the landlord or person levying the distress may, at the written request or with the written consent of the tenant, or such owner as aforesaid, sell the goods and chattels distrained or part of them at any time before the expiration of such extended period as aforesaid.

52.—From and after the commencement of this Act no person shall act as a bailiff to levy any distress on any holding to which this Act applies unless he shall be authorized to act as a bailiff by a certificate in writing under the hand of the judge of a county court; and every county court judge shall, on or before the thirty-first day of December one thousand eight hundred and eighty-three, and afterwards from time to time as occasion shall require, appoint a competent number of fit and proper persons to act as such bailiffs as aforesaid. If any person so appointed shall be proved to the satisfaction of the said judge to have been guilty of any extortion or other misconduct in the execution of his duty as a bailiff, he shall be liable to have his appointment summarily cancelled by the said judge.

### PART III.

#### *General Provisions.*

Commence-  
ment of Act.

53.—This Act shall come into force on the first day of January one thousand eight hundred and eighty-four, which day is in this Act referred to as the commencement of this Act.

Holdings to  
which Act  
applies.

54.—Nothing in this Act shall apply to a holding that is not either wholly agricultural or wholly pastoral, or in part agricultural, and as to the residue pastoral, or in whole or in part cultivated as a market garden, or to any holding let to the tenant during his continuance in any office, appointment, or employment held under the landlord.

Avoidance  
of agreement  
inconsistent  
with Act.

55.—Any contract, agreement, or covenant made by a tenant, by virtue of which he is deprived of his right to claim compensation under this Act in respect of any improvement mentioned in the First Schedule hereto (except an agreement providing such compensation as is by this

Act permitted to be substituted for compensation under this Act), shall, so far as it deprives him of such right, be void both at law and in equity. 46 & 47 Vict.  
c. 61.

56.—Where an incoming tenant has, with the consent in writing of his landlord, paid to an outgoing tenant any compensation payable under or in pursuance of this Act in respect of the whole or part of any improvement, such incoming tenant shall be entitled on quitting the holding to claim compensation in respect of such improvement or part in like manner, if at all, as the outgoing tenant would have been entitled if he had remained tenant of the holding, and quitted the holding at the time at which the incoming tenant quits the same. Right of tenant in respect of improvement purchased from outgoing tenant.

57.—A tenant shall not be entitled to claim compensation by custom or otherwise than in manner authorized by this Act in respect of any improvement for which he is entitled to compensation under or in pursuance of this Act, but where he is not entitled to compensation under or in pursuance of this Act he may recover compensation under any other Act of Parliament, or any agreement or custom, in the same manner as if this Act had not passed. Compensation under this Act to be exclusive

58.—A tenant who has remained in his holding during a change or changes of tenancy shall not thereafter on quitting his holding at the determination of a tenancy be deprived of his right to claim compensation in respect of improvements by reason only that such improvements were made during a former tenancy or tenancies, and not during the tenancy at the determination of which he is quitting. Provision as to change of tenancy.

59.—Subject as in this section mentioned, a tenant shall not be entitled to compensation in respect of any improvements, other than manures as defined by this Act, begun by him, if he holds from year to year, within one year before he quits his holding, or at any time after he has given or received final notice to quit, and, if he holds as a lessee, within one year before the expiration of his lease. Restriction in respect of improvements by tenant about to quit.

A final notice to quit means a notice to quit which has not been waived or withdrawn, but has resulted in the tenant quitting his holding.

The foregoing provisions of this section shall not apply in the case of any such improvement as aforesaid—

- (1) Where a tenant from year to year has begun such improvement during the last year of his tenancy, and, in pursuance of a notice to quit thereafter given by the landlord, has quitted his holding at the expiration of that year; and
- (2) Where a tenant, whether a tenant from year to year or a lessee, previously to beginning any such improvement, has served notice on his landlord of his intention to begin the same, and the landlord has either assented or has failed for a month after the receipt of the notice to object to the making of the improvement.

60.—Except as in this Act expressed, nothing in this Act shall take away, abridge, or prejudicially affect any power, right, or remedy of a landlord, tenant, or other person vested in or exerciseable by him by virtue of any other Act or law, or under any custom of the country, or otherwise, in respect of a contract of tenancy or other contract, or of any improvements, waste emblements, tillages, away-going crops, fixtures, tax, rate, tithe rentcharge, rent, or other thing. General saving of rights.

61.—In this Act—

“Contract of tenancy” means a letting of or agreement for the letting land for a term of years, or for lives, or for lives and years, or from year to year:

A tenancy from year to year under a contract of tenancy current at the commencement of the Act shall for the purposes of this Act be deemed to continue to be a tenancy under a contract of tenancy current at the commencement of this Act until the first day on which either the landlord or tenant of such tenancy could, the Interpretation.

46 & 47 VICT.  
c. 61.

one by giving notice to the other immediately after the commencement of this Act, cause such tenancy to determine, and on and after such day as aforesaid shall be deemed to be a tenancy under a contract of tenancy beginning after the commencement of this Act:

"Determination of tenancy" means the cesser of a contract of tenancy by reason of effluxion of time, or from any other cause:

"Landlord" in relation to a holding means any person for the time being entitled to receive the rents and profits of any holding:

"Tenant" means the holder of land under a landlord for a term of years, or for lives, or for lives and years, or from year to year:

"Tenant" includes the executors, administrators, assigns, legatee, devisee, or next of kin, husband, guardian, committee of the estate or trustees in bankruptcy of a tenant, or any person deriving title from a tenant; and the right to receive compensation in respect of any improvement made by a tenant shall enure to the benefit of such executors, administrators, assigns, and other persons as aforesaid:

"Holding" means any parcel of land held by a tenant:

"County court," in relation to a holding, means the county court within the district whereof the holding or the larger part thereof is situate:

"Person" includes a body of persons and a corporation aggregate or sole:

"Live stock" includes any animal capable of being distrained:

"Manures" means any of the improvements numbered twenty-two and twenty-three in the third part of the First Schedule hereto:

The designations of landlord and tenant shall continue to apply to the parties until the conclusion of any proceedings taken under or in pursuance of this Act in respect of compensation for improvements, or under any agreement made in pursuance of this Act.

Repeal of  
Acts of 1875  
and 1876.

62.—On and after the commencement of this Act, the Agricultural Holdings (England) Act, 1875, and the Agricultural Holdings (England) Act, 1875, Amendment Act, 1876, shall be repealed.

Provided that such repeal shall not affect—

(a) anything duly done or suffered, or any proceedings pending under or in pursuance of any enactment hereby repealed; or

(b) any right to compensation in respect of improvements to which the Agricultural Holdings (England) Act, 1875, applies, and which were executed before the commencement of this Act; or

(c) any right to compensation in respect of any improvement to which the Agricultural Holdings (England) Act, 1875, applies, although executed by a tenant after the commencement of this Act if made under a contract of tenancy current at the commencement of this Act; or

(d) any right in respect of fixtures affixed to a holding before the commencement of this Act;

and any right reserved by this section may be enforced after the commencement of this Act in the same manner in all respects as if no such repeal had taken place.

Short title  
of Act.  
Limits of  
Act.

63.—This Act may be cited for all purposes as the Agricultural Holdings (England) Act, 1883.

64.—This Act shall not apply to Scotland or Ireland.

## FIRST SCHEDULE.

46 & 47 VICT.  
c. 61.

## PART I.

## IMPROVEMENTS TO WHICH CONSENT OF LANDLORD IS REQUIRED.

- (1) Erection or enlargement of buildings.
- (2) Formation of siloes.
- (3) Laying down of permanent pasture.
- (4) Making and planting of osier beds.
- (5) Making of water meadows or works of irrigation.
- (6) Making of gardens.
- (7) Making or improving of roads or bridges.
- (8) Making or improving of watercourses, ponds, wells, or reservoirs, or of works for the application of water power or for supply of water for agricultural or domestic purposes.
- (9) Making of fences.
- (10) Planting of hops.
- (11) Planting of orchards or fruit bushes.
- (12) Reclaiming of waste land.
- (13) Warping of land.
- (14) Embankment and sluices against floods.

## PART II.

## IMPROVEMENT IN RESPECT OF WHICH NOTICE TO LANDLORD IS REQUIRED.

- (15) Drainage.

## PART III.

## IMPROVEMENTS TO WHICH CONSENT OF LANDLORD IS NOT REQUIRED.

- (16) Boning of land with undissolved bones.
- (17) Chalking of land.
- (18) Clay-burning.
- (19) Claying of land.
- (20) Liming of land.
- (21) Marling of land.
- (22) Application to land of purchased artificial or other purchased manure.
- (23) Consumption on the holding by cattle, sheep, or pigs of cake or other feeding stuff not produced on the holding.

## SECOND SCHEDULE.

Levying distress. Three per centum on any sum exceeding 20*l.* and not exceeding 50*l.* Two and a half per centum on any sum exceeding 50*l.* Section 40.

To bailiff for levy, 1*l.* 1*s.*

To man in possession, if boarded, 3*s.* 6*d.* per day; if not boarded, 5*s.* per day.

For advertisements the sum actually paid.

To auctioneer. For sale five pounds per centum on the sum realized not exceeding 100*l.*, and four per centum on any additional sum realized not exceeding 100*l.*, and on any sum exceeding 200*l.* three per centum. A fraction of 1*l.* to be in all cases considered 1*l.*

Reasonable costs and charges where distress is withdrawn or where no sale takes place, and for negotiations between landlord and tenant respecting the distress; such costs and charges in case the parties differ to be taxed by the registrar of the county court of the district in which the distress is made.



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